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(Reports)

(The Supreme Court.)

I] JANUARY [1970

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.

Malini Ayyappa Naicker (dead) by his legal representative, etc. .. *Appellants**

v.

Seth Manghraj Udhavadas firm by Managing Partner, Chathurbhuj Chhabildas (dead) by his legal representatives and others etc. .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *section* 53 *and proviso to section* 75 (1)—*Interpretation—Insolvency jurisdiction—Exercise of—Appeal to the District Court—Findings—Appellate order made final—High Court if could interfere with the findings and reappreciate the evidence on record.*

The Insolvency Court held that the mortgages in question were not supported by consideration and that they were executed with a view to screen some of the properties of the insolvents from their creditors. It accordingly annulled those mortgages under section 53 of the Provincial Insolvency Act. In appeal the learned District Judge reversed the findings of the trial Court. He came to the conclusion that those mortgages were fully supported by consideration and that they were genuine transactions. The High Court acting under the 1st proviso to section 75 (1) of the Act reversed the judgment of the learned District Judge and restored that of the Insolvency Court.

Was the High Court within its jurisdiction in interfering with the findings of the learned District Judge that the impugned transactions are *bona fide* transaction and that they were supported by consideration ?

Section 75 of the Act provided that the debtor, any creditor the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final. The 1st proviso provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit :

Quite clearly the Legislature did not confer on the High Court under the 1st proviso to section 75 (1) of the Act an appellate power nor did it confer on it a jurisdiction to reappreciate the evidence on record While exercising that power the High Court is by and large bound by the findings of fact reached by the District

* C. As. Nos. 845 and 846 of 1963. 13th February, 1969.

Court. If the Legislature intended to confer power on it to re-examine both questions of law and fact it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent Court is also a decision according to law. For these reasons it is difficult to accept the contention that the power conferred under the 1st proviso to section 75 (1) of the Act enables it to *de novo* examine the findings of fact reached by the District Court.

Appeals by Special Leave from the Judgment and Order dated the 17th January, 1958 of the Madras High Court in Civil Revision Petitions Nos. 981 and 982 of 1956.

S.V. Gupte, Senior Advocate, (*R. Thiagarajan*, Advocate, with him), for Appellants in both the Appeals.

Naunit Lal, Advocate, for Respondents Nos. 1 (*c*) and 17 in C.A. No. 845 of 1963 and Respondents Nos. 1 (*c*) and 16 in C.A. No. 846 of 1963.

The Judgment of the Court was delivered by

Hegde, J.—These appeals arise from an insolvency proceeding wherein one Ponnayya Konar and his sons were adjudicated as insolvents. In the said proceeding the petitioning creditor sought to get annulled two mortgages one for Rs. 15,000 (Exhibit A-1) executed by the insolvents in favour of Ayyappa Naicker, the appellant in Civil Appeal No. 845 of 1963 and the other for Rs. 10,000 (Exhibit A-2), the subject-matter of Civil Appeal No. 846 of 1963, in favour of one Srinivasa Naicker, the father-in-law of the aforementioned Ayyappa Naicker. The said Srinivasa Naicker is dead and the appeal is being prosecuted by his legal representatives. Both those mortgages are dated 4th November, 1950 and they were registered on 6th November, 1950. The Insolvency Court held that those mortgages were not supported by consideration and that they were executed with a view to screen some of the properties of the insolvents from their creditors. It accordingly annulled those mortgages under section 53 of the Provincial Insolvency Act (hereinafter referred to as the Act). In appeal the learned District Judge reversed the findings of the trial Court. He came to the conclusion that those mortgages were fully supported by consideration and that they were genuine transactions. The High Court acting under the 1st proviso to section 75 (1) of the Act reversed the judgment of the learned District Judge and restored that of the Insolvency Court. These appeals have been brought against the decision of the High Court after obtaining Special Leave from this Court.

The learned Counsel for the appellants challenged the decision of the High Court primarily on two grounds. According to him the High Court while acting under the 1st proviso to section 75 (1) of the Act had no power to disturb the findings of fact reached by the appellate Court. Next he contended that the conclusions of the High Court are unsustainable on the evidence on record. The learned Counsel for the contesting respondents supported the decision of the High Court.

The two principal questions that arise for decision in these appeals are: (1) was the High Court within its jurisdiction in interfering with the findings of the learned District Judge that the impugned transactions are *bona fide* transaction and that they were supported by consideration and (2) Are the conclusions reached by the High Court correct on the facts and circumstances of the case? It would be convenient to take up first, the question as to the scope of the powers of the High Court under the 1st proviso to section 75 (1) of the Act. That section reads :

"The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final:

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit:

Provided further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure, 1908."

According to Shri S. V. Gupte, learned Counsel for the appellants the jurisdiction of a High Court under the 1st proviso to section 75 (1) is a very limited one, the same being not more than that conferred on it by sub-section (1) of section 100 of the Code of Civil Procedure. In support of his contention he invited our attention to the scheme of section 75 (1) of the Act. He urged that sub-section (1) of section 75 prescribes that the decision of the District Court in appeal is final and the finality conferred on the decision of the District Court is subject to a very limited scrutiny by the High Court. We were further told that the power conferred on the High Court under the 1st proviso to section 75 (1) is only a revisional power, which power in its very nature is narrower in compass than an appellate power. According to him the power conferred under the 1st proviso to section 75 (1) of the Act is co-extensive with that given to the High Court under section 100 (1) (*a*) of the Code of Civil Procedure.

On the other hand Mr. Naunit Lal, learned Counsel for the respondent urged that the High Court under the 1st proviso to section 75 (1) of the Act has an extensive power and that power is very much wider than the power conferred on it under section 100 (1) (*a*) of the Code of Civil Procedure ; the power of the High Court under the 1st proviso to section 75 (1) of the Act to call for the case to satisfy itself that the order made by the District Court was according to law and pass such other order in respect thereto as it thinks fit includes within itself the right to examine whether the District Court had taken into consideration all the material evidence and whether it had properly assessed that evidence.

We are of the opinion that the extreme contentions advanced on either side cannot be accepted. Quite clearly the Legislature did not confer on the High Court under the 1st proviso to section 75 (1) of the Act an appellate power nor did it confer on it a jurisdiction to re-appreciate the evidence on record. While exercising that power the High Court is by and large bound by the findings of fact reached by the District Court. If the Legislature intended to confer power on it to re-examine both questions of law and fact it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent Court is also a decision according to law. For these reasons we cannot accept the contention of Mr. Naunit Lal that the power conferred under the 1st proviso to section 75 (1) of the Act enables it to *de novo* examine the findings of fact reached by the District Court.

A decision being "contrary to law" as provided in section 100 (1) (*a*) of the Code of Civil Procedure, is not the same thing as a decision being not "according to law" as prescribed in the 1st proviso of section 75 (1) of the Act. The latter expression is wider in ambit than the former. It is neither desirable nor possible to give an exhaustive definition of the expression "according to law." The power given to the High Court under the 1st proviso to section 75 (1) of the Act is similar to that given to it under section 25 of the Provincial Small Causes Courts Act. Explaining the scope of the latter provision Beaumont, C.J., (as he then was) in *Bell & Co., Ltd.* v. *Waman Hemraj*[1], observed :

"The object of section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. The section does not enumerate the cases in which the Court may interfere in revision, as does section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt any exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the

1. (1938) 40 Bom.L.R. 125.

Court which made the order had no jurisdiction or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at."

The said statement of the law was accepted as correct by this Court in *Hari Shankar* v. *Rao Girdhari Lal Chowdhury*[1]. We think the same applies squarely to the 1st proviso to section 75 (1) of the Act.

In support of his contention Mr. Gupte placed considerable reliance on the decision of this Court in *Official Receiver, Kanpur and another* v. *Abdul Shakur and others*[2], wherein this Court held that the High Court in exercise of its power under the 1st proviso to section 75 (1) of the Act is incompetent to disturb the findings of fact reached by the District Court and further the question whether a statutory presumption was rebutted by the rest of the evidence on record was also a question of fact which again was not open to be reviewed by the High Court. Shah, J., who spoke for the Court observed thus at p. 259.

" The District Court inferred from the facts found that the statutory presumption under section 118 of the Negotiable Instruments Act had been weakened and the burden which lay upon the insolvent was discharged and it was not open to the High Court exercising jurisdiction under section 75 (1) proviso 1, nor even under proviso 2 of the Provincial Insolvency Act to set aside the judgment of the District Court, for it is well settled that the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact. "

It may be remembered that Shah, J., was also a party to the decision in *Hari Shankar's case*[1]. We see no conflict between the two decisions. The former decision enumerates some of the circumstances under which the High Court can interfere while considering whether the decision under review was made according to law. All that is laid down in Abdul Shakur's case is that the High Court is not competent to disturb a finding of fact reached by the District Court even if in reaching that finding it was required to take into consideration a statutory presumption.

We shall now proceed to examine the facts of this case bearing in mind the principles set out above.

We shall first set out the undisputed facts. The respondent Ponnayya Konar was a well to do person. He had one rice mill at Kivalur and another at Sirkali. He also had landed properties in Sirkali and Tuticorin. He was having money dealings with the family of Sreenivasa Naicker from about the year 1925. Under the original of Exhibit B-1, a registered deed of *othi* dated 28th September, 1925, he had borrowed a sum of Rs. 30,000 from Rangappa Naicker, the father of Srinivasa Naicker. On 5th October 1930, the said deed was renewed by the execution of a simple mortgage deed by Ponnayya Konar and his sons in favour of Rangappa Naicker. Under the registered mortgage deed dated 13th January, 1942 (Exhibit B-4 is its copy), the insolvents had borrowed from Ayyappa Naicker Rs. 20,000 out of which he discharged some of the debts due to Rangappa Naicker. Ayyappa Naicker was himself a rich man. Under the partition deed entered into in his family on 30th October, 1936 (Exhibit B-3) he got a cash of Rs. 52,000 and lands measuring 250 acres. The debt due to Ayyappa Naicker under the deed dated 13th January, 1942 was discharged by payment of Rs. 5,000 and interest on 3rd April, 1948 and Rs. 15,000 and interest on the 28th March, 1949, as can be seen from Exhibits B-5 and B-6.

1. (1962) 1 S.C.R. (Supp.) 933.
2. (1965) 2 S.C.J. 691 : (1965) 2 An.W.R. (S.C.) 152 : (1965) 2 M.L.J. (S.C.) 152 : (1965) 1 S.C.R. 254.

The case of the mortgagees is that when Exhibits A-1 and A-2 were executed they were unaware of the fact that the insolvents had got into financial difficulties by then. The learned District Judge has accepted this plea and the learned Judge of the High Court has not come to a contrary conclusion.

There was no relationship between the insolvents and the mortgagees. In fact they belong to different communities. The insolvents are Hindus and the mortgagees are Christians. They also live at different places. The insolvents were residing at Sirkali and the mortgagees at Tuticorin, a place which is at a considerable distance from Sirkali.

According to the mortgagees the circumstances under which Exhibits A-1 and A-2 came to the executed are as follows :—

In about the beginning of 1950 Ponnayya Konar approached Srinivasa Naicker for a loan of Rs. 30,000. Srinivasa Naicker told him that he and his son-in-law Ayyappa Naicker together would lend him a sum of Rs. 25,000 on the mortgage of his properties at Tuticorin. But as they did not have the entire sum of Rs. 25,000 in their hands at that time, a sum of Rs. 10,000 was paid to Ponnayya Konar on 28th April, 1950 and a promissory note was taken for that amount (Exhibit A-11). In the beginning of September, 1950 Ponnayya Konar sent his son Arulappan with the letter (Exhibit B-7) to get some more money. Accordingly another sum of Rs. 5,000 was paid on 8th September, 1950 and the pronote (Exhibit A-12) was taken from Arulappan. They agreed to pay the balance amount promised to be advanced at the time of the execution of the mortgage deeds. The mortgage deeds were got written up and executed on 4th November, 1950. Therein it was recited that they were executed for cash consideration. It was thought that the mortgagees would be able to pay the balance amount before the registration of the documents on 6th November, 1950. But by that time they were not able to got together the entire amount that remained to be paid. On the date of the registration, Ayyappa Naicker paid to the mortgagors only a sum of Rs. 4,500 another sum of Rs. 500 was adjusted towards the interest due on the sum of Rs. 15,000 previously advanced in April and September. The remaining sum of Rs. 5,000 was paid in two instalments, a sum of Rs. 1,700 through Amirthan, the 3rd son of Ponnayya Konar on 7th January, 1951 and the remaining sum of Rs. 3,300 again through Amirthan on 10th February, 1951.

In the insolvency proceedings on the application of the petitioning creditor, a commissioner to search the house of the insolvents and seize their books of account and other relevant records was appointed. After search the commissioner seized from the house of the insolvents several account books (ledgers as well as day books) as well as Exhibits A-11 and A-12 which were found punched and defaced. Exhibits A-11, A-12 as well as several of the entries in the ledger and day-books were marked by consent in the proceedings from which these appeals have arisen. Hence their genuineness is not open to question.

It is most unlikely that those documents were got up by the insolvents and kept in their house depending on the off-chance of a Court commissioner searching their house and seizing them, so that they may serve as corroborating evidence in support of the impugned mortgages. If Exhibits A-11 and A-12 as well as the entries in the account books were intended to support the claim under Exhibits A-1 and A-2, the most natural course would have been to draw up the mortgage deeds in such a way as to take assistance from them. In that case the mortgage deeds would not have recited that they were executed for cash consideration. Further Exhibits A-11 and A-12 would have been left in the possession of the mortgagees. We are convinced that the version put forward by the mortgagees is substantially true. The original agreement between the parties was to take mortgagees of the Tuticorin properties for cash consideration. The intermediate steps taken were necessitated by the fact that mortgagees were not able to get together in one lump the required amount. The promissory notes Exhibits A-11 and A-12 were taken as stop gap arrangements. The recitals in the mortgage deeds accord with the original agreement between the

parties. That was likely to be the reason why the promissory notes Exhibits A-11 and A-12 were returned to the parties. The entries in the account books of the insolvents reflect the transactions as they took place. If they were bogus entries made to support Exhibits A-1 and A-2, a receipt of Rs. 25,000 in cash on 4th November, 1950 would have been shown therein. The learned District Judge correctly thought that the account entries in question had a great deal of intrinsic value. On the other hand the insolvency Court and the High Court unnecessarily allowed themselves to be influenced by the apparent contradiction appearing between the recitals in Exhibits A-1 and A-2 and those in Exhibits A-11, A-12 and the account entries.

One other circumstance which had weighed with the High Court in holding that Exhibits A-1 and A-2 do not represent genuine transactions is that in their pleadings the mortgagees have stuck to their case that cash consideration passed under Exhibits A-1 and A-2 and this the Court thought was a deliberately false plea. The learned District Judge had carefully considered this circumstance but was of opinion that the same was of no consequence. We think that the High Court had attached undue importance to that circumstance. The issue before the parties at the time of the pleadings was whether the mortgages in question were supported by consideration or not and not the manner in which that consideration was paid. In their plea the mortgagees were merely adhering to the tenor of the mortgage deeds. From the facts stated earlier, it is clear that the mortgagees at all stages proceeded on the basis that Exhibits A-1 and A-2 were executed for cash consideration, the other steps taken by them being merely incidental.

The last and by far the most important circumstance that appears to have influenced the High Court was the failure of the mortgagees to produce their account books. This circumstance was carefully considered by the District Judge. He held that the adverse inference that could be drawn from that circumstance was rebutted by the other evidence available in the case. It was open to him to do so. His finding on this point is also a finding of fact and by no means a wholly unreasonable finding. The High Court could not have interfered with the same.

From the above discussion it follows that generally speaking—we shall come to the details of consideration presently—the findings of the District Court as regards payment of consideration under Exhibits A-1 and A-2 are findings of facts and they were not open to review by the High Court.

This takes us to the various items of consideration said to have passed under Exhibits A-1 and A-2 and the proof thereof. The District Court has held that the entire consideration mentioned in those documents has passed. We have now to see whether its finding in respect of the various items of consideration is supported by legal evidence. The challenge to the payment of consideration under Exhibits A-1 and A-2 made by the petitioning creditor includes a challenge to the passing of the various items of consideration said to have passed. Ordinarily the burden of proving that a document impeached under section 53 of the Act is not supported by consideration is on the party who challenges its validity. That is so because the party who stands by the document can take advantage of the admission made by the insolvent in the document in question. But in this case the mortgagees themselves do not stand by the recitals in the documents as regards the manner in which consideration was paid. Therefore it is for them to prove the passing of consideration. Hence we have to see how far they have succeeded in proving the same.

We shall first take up Exhibit A-2, the mortgage deed executed in favour of Srinivasa Naicker. It is said that the consideration payable under that mortgage was paid in the following manner :

Rs. 5,000 under promissory note Exhibit A-11 ;

Rs. 1,700 paid in cash on 7th January, 1951 and

Rs. 3,300 also paid in cash on 10th February, 1951.

The receipt of the aforementioned sums is entered in the day-book and ledger of the insolvents. The relevant entries amount to an admission on the part of the insolvents of having received the amounts mentioned therein. We have earlier considered the authenticity of those account books. The evidence of the mortgagees as regards the payment of consideration is strongly corroborated by the entries in the insolvents' account books. It was open to the learned District Judge to rely on them. Hence his finding as regards the validity of the mortgage under Exhibit A-2 must be held to be final.

So far as the consideration for Exhibit A-1 is concerned it is said to have been made up of—

(i) a sum of Rs. 10,000 advanced under Exhibit A-11 ;

(ii) Rs. 500 the interest due under Exhibit A-11 and A-12 ; and

(iii) Rs. 4,500 paid on 6th November, 1950.

The receipts of the various sums mentioned above excepting the sum of Rs. 4,500 said to have been paid on 6th November, 1950, are entered in the day-book and the ledger of the insolvents. Hence to that extent the finding of the learned District Judge is unassailable. So far as the payment of Rs. 4,500 said to have been made on 6th November, 1950 is concerned no corresponding entry in the day-book or the ledger had been proved. This important circumstance was not noticed by the learned District Judge. He proceeded on the basis that the account entries support the payment of that item as well. The evidence of Ayyappa Naicker as regards that payment is necessarily interested. The only other evidence on that point is that of P.W. 2, the Registrar who registered Exhibits A-1 and A-2. He is a relation of the insolvents. He did not endorse that payment in Exhibit A-1, though he knew that he was required to do so under the rules. We are also surprised how he could have remembered that fact after several years. Had the learned District Judge's attention been drawn to the fact that there is no documentary evidence in proof of the payment of that item it is highly doubtful whether he would have held in favour of the mortgagee as regards the payment of that item. After going through the evidence bearing on the point we are not satisfied that the payment of that amount is satisfactorily proved.

In the result Civil Appeal No. 846 of 1963 is allowed and the judgment and decree of the High Court is set aside and that of the District Court restored. Civil Appeal No. 845 is allowed in part *i. e.*, the mortgage Exhibit A-1 is held to be valid to the extent of Rs. 10,500 and interest thereon. In the circumstances of the case we direct the parties to bear their own costs in all the Courts.

V.M.K. *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice* AND G. K. MITTER, J.

K. Venkateswara Rao and another .. *Appellants**

v.

Bekkam Narasimha Reddi and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), sections 82 (b) and 86 (1), Civil Procedure Code (V of 1908), Order 6, rule 17 and Limitation Act (XXXVI of 1963), section 29 (2)—Candidate against whom allegation of corrupt practice is made not impleaded as party in time—Effect of—Delay in impleading—Condonation—Not permissible—Provisions of Limitation Act inapplicable.

Representation of the People Act (XLIII of 1951), section 99—Applicability of, to a necessary party.

Representation of the People Act (XLIII of 1951), sections 79 (b) and 82 (b)—Imputation of corrupt practice against a person—Such person withdrawing from contest—Necessity to implead—Whether such person a candidate—If the payment amounts to an illegal gratification the taint attaches not only to the payer but also to the payee.

The right to elect is statutory and so are all the processes connected with the election. There is no element of any common law right in the process of election (After analysing the provisions of the Act it was held that the trial of an election petition is not the same thing as the trial of a suit). Even though section 87 (1) of the Act lays down that the procedure applicable to the trial of an election petition shall be like that of the trial of a suit, the Act itself makes important provisions of the Code inapplicable to the trial of an election petition. Under Order 6, rule 17, Civil Procedure Code, a Court of law trying the suit has very wide powers in the matter of allowing amendments of pleadings and all amendments which will aid the Court in disposing of the matters in dispute between the parties are as a rule allowed subject to the law of limitation. But section 86 (5) of the Act provides for restrictions on the power of the High Court to allow amendments. The High Court is not to allow the amendment of a petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. With regard to the addition of parties which is possible in the case of a suit under the provisions of Order 1, rule 10, subject to the added party's right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-section (4) of section 86. of the Representation of the People Act. Under section 86 (1) it is incumbent on the High Court to dismiss an election petition which does not comply with the provisions of section 81 or section 82. Again the High Court must dismiss an election petition if security for costs be not given in terms of section 117 of the Act.

It is well settled that amendments to a petition in a civil proceeding and the addition of parties to such a proceeding are generally possible subject to the law of limitation. But an election petition stands on a different footing. The trial of such a petition and the powers of the Court in respect thereof are all circumscribed by the Act. *Held*, the Limitation Act cannot apply to proceedings like an election petition inasmuch as the Representation of the People Act is a complete and self contained Code which does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act.

There is no section in the Act as it stands now which equates an order made by the High Court under section 98 or section 99 to a decree passed by a civil Court subordinate to the High Court. An appeal being a creature of a statute the rights conferred on the appellant must be found within the four corners of the Act. Sub-section (2) of the present section 116-A expressly gives this Court the dis-

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* C.A. No. 1864 of 1967. 13th August, 1968.

cretion and authority to entertain an appeal after the expiry of the period of thirty days. No right is however given to the High Court to entertain an election petition which does not comply with provisions of section 81, section 82 or section 117.

Although the Act has been amended on several occasions, a provision like section 86 (1) as it now stands has always been on the statute book but whereas in the Act of 1951 the discretion was given to the Election Commission to entertain a petition beyond the period fixed if it was satisfied as to the cause for delay no such saving clause is to be found now. The Legislature in its wisdom has made the observance of certain formalities and provisions obligatory and failure in that respect can only be visited with a dismissal of the petition.

Section 99 only enjoins upon the High Court to give an opportunity to a person sought to be held guilty of a corrupt practice if he was not a party to the petition, but it does not apply to a person who is a necessary party thereto.

It cannot be said that after a candidate has withdrawn from the contest he was no longer a candidate within the meaning of section 79 (*b*) or 82 (*b*) of the Act.

[Even though the Indian Limitation Act, 1963, does not apply to an election petition provisions like sections 9 and 10 of the General Clauses Act, 1897, providing for computation of time which are in *pari materia* with sections 12 (1) and 4 of the Limitation Act would apply to such a petition.]

Appeal under section 116-A of the Representation of the People Act, 1951, from the Judgment and Order dated the 21st August, 1967 of the Andhra Pradesh High Court in Election Petition No. 13 of 1967.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Appellants.

D. Narasaraju, Senior Advocate (*R. V. Pillai* and *A. Sitarama Reddy*, Advocates, with him), for Respondent No. 1.

G. Narayana Rao, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Mitter, J.—On 6th April, 1967 the appellants before us, filed an Electon Petition in the High Court of Andhra Pradesh challenging the election of the first respondent, B. N. Reddi to the Andhra Pradesh Legislative Assembly from the Kollapur—Constituency *inter alia* on the ground of corrupt practices committed by him, his election agent, polling agents and other workers mentioned in the schedule to the petition with his consent and praying for a declaration that the second respondent, K. Ranga Das was duly elected from the said constituency. The third respondent was another candidate who had contested the election but had fared very badly. The first respondent secured 25,321 votes at the election overtopping the votes polled by the second respondent by approximately 1,600. The petitioners stated in paragraph 5 of the petition that one V. K. Reddi who had filed his nomination paper had been made to withdraw his candidature by the first respondent on payment of an illegal gratification of a sum of Rs. 10,000. This allegation was repeated in paragraph 10. The first respondent was also charged with other corrupt practices in diverse other paragraphs of the petition.

The first respondent put in his written statement on 20th June, 1967; the econd respondent put in his counter-affidavit on 26th June, 1967. The issues were settled on 24th July, 1967. On 4th August, 1967 the petitioners filed Application No. 161 of 1967 for impleading V. K. Reddi. Thereafter they wanted to withdraw that application when the examination of witnesses had commenced. On 7th August, 1967 this application was dismissed. On 8th August, 1967 the first respondent filed Application No. 169 of 1967 praying for dismissal of the petition on the ground that although V. K. Reddi had been charged with corrupt practices he had not been impleaded as a party to the petition which was liable to be dismissed under the provisions of section 82 (*b*) of the Representation of the People Act, 1951 (hereinafter referred to as the 'Act') in compliance with section 86 (1). The election peti-

tioners filed Application No. 187 of 1967 for withdrawing the allegations against V. K. Reddi, or, in the alternative, to implead him as a respondent. They also filed Application No. 186 of 1967 for condoning the delay in seeking to implead V.K. Reddi in Application No. 187 of 1967. The second respondent filed a number of applications of which it is necessary to take note of a few only. Application No. 174 of 1967 was filed for condoning the delay in seeking to implead V. K. Reddi in Application No. 175 of 1967. Application No. 175 of 1967 was for the purpose of impleading V. K. Reddi as a party respondent to the election petition.

The learned trial Judge held that the allegations contained in the election petition amounted to an imputation of corrupt practice to V. K. Reddi and although of the view that the prayer in Application No. 169 of 1967 for condonation of delay was allowable in suitable cases, he felt himself bound by the decision of Kumarayya, J., in Applications Nos. 150-155 of 1967 in Election Petition No. 11 of 1967 and dismissed the amendment Application No. 169 of 1967.

Before us a faint attempt was made to argue that the allegation against V.K. Reddi did not amount to a charge of corrupt practice but that it was the first respondent who was guilty of such a practice by making the payment of illegal gratification. The argument has only to be set down to be rejected. In paragraph 5 of the petition the definite averment was that V. K. Reddi had been made to withdraw his candidature by the first respondent on payment of an illegal gratification of Rs. 10,000. If the payment of Rs. 10,000 amounts to an illegal gratification the taint attaches not only to the payer, the first respondent but also to the payee, V. K. Reddi.

The second point urged was that the learned Chief Justice's view in regard to the power of condonation of delay in impleading V. K. Reddi was correct and although he could not give effect to his own view because he felt himself bound by the decision of Kumarayya, J., we ought to accept the appeal and uphold his view. This argument was developed as follows. An election petition was in essence an application to the High Court for the purpose of the Indian Limitation Act and as such section 29 (2) of the Act of 1963 was applicable to such petitions drawing in its chain the applicability of section 5 of the Act giving the Court the power to admit the same if it was satisfied that the applicant had sufficient cause for not preferring the application within the prescribed period of limitation.

The Act as it now stands provides by section 80-A that the Court having jurisdiction to try an election petition shall be the High Court. Under section 81 (1) "an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days, but not earlier than, the date of election of the returned candidate......"

Section 82 runs as follows :—

"A petitioner shall join as respondents to his petition—

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates ; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

Section 83 lays down *inter alia* that an election petition shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of such practice.

Section 86 (1) provides that:

"The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117".

The last mentioned section relates to the giving of security for costs. Sub-section (4) of section 86 gives any candidate not already a respondent a right to be joined as one upon application to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made. Under sub-section (5) :

> "The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.".

Sub-sections (6) and (7) aim at the speedy disposal of the election petitions. Section 87 (1) provides that :

> "Subject to the provisions of this Act and of any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits."

The proviso to the sub-section gives the High Court discretion to refuse, for reasons to be recorded in writing, to examine any witness. Sub-section (2) makes the provisions of the Indian Evidence Act applicable in all respects to the trial of an election petition. Section 98 shows the nature of the order to be made by the High Court at the conclusion of the trial of an election petition. Section 99 makes it obligatory on the High Court while making an order under section 98 in case where any charge is made in the petition of any corrupt practice having been committed at the election, to record a finding whether any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice as also the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice. There is a proviso to the section which lays down that a person who is not a party to the petition shall not be so named unless he has been given notice to appear before the High Court and to show cause to the contrary. In case he does so, he is further given the right to cross-examine any witness already examined by the High Court and to give evidence in his defence.

Entry 72 of List I of the Seventh Schedule vests in Parliament the exclusive power to make laws with respect to elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President as also the Election Commission. Under Article 329 (*b*).

> "Notwithstanding anything in this Constitution—
>
> (*a*) * * * * *
>
> (*b*) no election to either House of Parliament or to the House of either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

In order to determine whether an election petition launched for the purpose of contesting the validity of an election is an application within the meaning of the Indian Limitation Act, it is necessary to examine the nature of the rights and liabilities involved therein and of the provisions of law which govern such determination. The right of citizens to elect representatives of their choice either to the House of the People or to a Legislative Assembly of a State, the process of election beginning from the notification of general elections and the nomination of candidates the general procedure at elections, taking of the poll and counting of votes and the publication of election results are all matters dealt with and covered by different provisions of the Act. The right to elect is statutory and so are all the processes connected with the election. There is no element of any common law right in the process of election. Part VI of the Act deals with disputes regarding election. The

second chapter of this Part shows how elections may be called in question, which Courts have jurisdiction to try election petitions, how such a petition is to be presented, who are to be parties to the petition, what are to be the contents of the petition as also the relief which may be claimed by the petitioner. The third chapter of this Part deals with the trial of election petitions. The first section of this group makes it incumbent on the High Court to dismiss an election petition straightaway if it does not comply with certain statutory requirements. The next section is a guide to the procedure to be adopted by the High Court in the trial of an election petition. This section does not equate an election petition with a suit but merely shows that subject to the provisions of the Act and of any rules made thereunder, the trial is to conform as nearly as possible to the trial of a suit under the Code of Civil Procedure. This means that (*a*) the contestants have a right to file written statements, (*b*) both parties must disclose the documents on which they rely ; (*c*) they must examine witnesses orally, if necessary, to substantiate the charges levelled or the defences raised in the petition ; and (*d*) the evidence to be adduced must comply with the requirements of the Indian Evidence Act. There are however certain limitions as to the questions which may be put to a witness contained in sections 94 and 95; the returned candidate has a right to recriminate under the provisions of section 97. The High Court does not pass a decree as in the case of a suit but has to make an order in terms of section 98 which gives the nature of the orders to be made. The High Court has to communicate the substance of its decision to the Election Commission and the Speaker or the Chairman as the case may be of the House of the People or of the State Legislature. Chapter IV deals with withdrawal and abatement of election petitions. Chapter IV-A deals with appeals from the decision of the High Court and Chapter V deals with costs and security for costs.

The above brief analysis is sufficient to show that the trial of an election petition is not the same thing as the trial of a suit. As was pointed out by this Court in the case of *Kamaraja Nadar* v. *Kunju Thevar*[1], the provisions of the Act

"go to show that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law..........".

The Court also emphasised on the peculiar character of an election petition by quoting from the observations of *A. Sreenivasan* v. *Election Tribunal, Madras*[2]. Reference was also made to the *Tipperary case*[3], where, Morris, J., said :

"............a petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."

This aspect of an election petition was emphasised again in the case of *Basappa* v. *Ayyappa*[4], where it was held that the provisions of Order 23, rule 1 of the Code of Civil Procedure do not apply to election petitions and it would not be open to a petitioner to withdraw or abandon a part of his claim once an election petition was presented to the Election Commission.

Even though section 87 (1) of the Act lays down that the procedure applicable to the trial of an election petition shall be like that of the trial of suit, the Act itself makes important provisions of the Code inapplicable to the trial of an election petition. Under Order 6, rule 17, Civil Procedure Code, a Court of law trying the suit has very wide powers in the matter of allowing amendment of pleadings and all amendments which will aid the Court in disposing of the matters in dispute between the parties are as a rule allowed subject to the law of limitation. But section 86 (5) of the Act provides for restrictions on the power of the High Court to allow amendments. The High Court is not to allow the amendment of a petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. With regard to the addition of parties which is possible in the case of a suit under the provisions of Order 1, rule 10, subject to the added party's right

1. (1958) S.C.J. 680 : (1958) 2 An.W.R.(S.C.) 52 : (1958) 2 M.L.J. (S.C.) 52 : (1959) S.C.R. 583 at 596.
2. (1955-56) 11 E.L.R. 278 at 293.
3. (1875) 3 O.M. & H. 19, 25.
4. (1958) S.C.J. 953 : (1958) 2 An.W.R. (S.C.) 165 : (1958) 2 M.L.J. (S.C.) 165 : (1959) S.C.R. 611.

to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-section (4) of section 86. Section 82 shows who are necessary parties to an election petition which must be filed within 45 days from the date of election as laid down in section 81. Under section 86 (1) it is incumbent on the High Court to dismiss an election petition which does no comply with the provisions of section 81 or section 82. Again the High Court must dismiss an election petition if security for costs be not given in terms of section 117 of the Act.

It is well settled that amendments to a petition in a civil proceeding and the addition of parties to such a proceeding are generally possible subject to the law of limitation. But an election petition stands on a different footing. The trial of such a petition and the powers of the Court in respect thereof are all circumscribed by the Act. The Indian Limitation Act of 1963 is an Act to consolidate and amend the law of limitation of suits and other proceedings and for purposes connected therewith. The provisions of this Act will apply to all civil poceedings and some special criminal proceedings which can be taken in a Court of law unless the application thereof has been excluded by any enactment: the extent of such application is governed by section 29 (2) of the Limitation Act. In our opinion however the Limitation Act cannot apply to proceedings like an election petition inasmuch as the Representation of the People Act is a complete and self-contained code which does not admit of the introduction of the principles or the provision of law contained in the Indian Limitation Act.

Before the recent amendment of the Representation of the People Act, election petitions had to be presented to the Election Commission and it was the Commission which was empowered under section 85 to dismiss the petition if the then provisions of section 81, section 83 and section 117 were not complied with. It is only when the petition was not so dismissed that the Election Commission had to appoint an Election Tribunal for the trial of the petition. Under section 85 the Commission had power to admit a petition presented after the prescribed period if it was satisfied that there was sufficient cause for the failure. Section 90 (4) of the Act of 1951 empowered the Tribunal to dismiss an election petition even if it had not been so dismissed by the Election Commission.

The Act as amended in 1966 gives the jurisdiction to try an election petition to the High Court of a State. The provision for appeal in section 116-A was introduced in the Act for the first time in 1956 providing for an appeal from every order of the Tribunal under section 98 or section 99 to the High Court of the State in which the Tribunal was situate. By sub-section (2) of section 116-A of the Act as amended in 1956 the High Court was, subject to the provisions of the Act, to have the same powers, jurisdiction and authority and was to follow the same procedure with respect to an appeal under this Chapter (Chapter IV-A) as if the appeal were an appeal from an original decree passed by a Court situate within the local limits of its civil appellate jurisdiction. Sub-section (3) fixed the time limit for filing the appeal to a period of 30 days from the date of the order complained of. The proviso to this sub-section gave the High Court discretion to entertain an appeal after the expiry of the period of 30 days if it was satisfied that the appellant had sufficient cause for not preferring the appeal within such period. This section was amended again in 1966 and section 116-A (1) now provides for an appeal from an order of the High Court under section 98 or section 99 to the Supreme Court on any question, whether of law or fact. Sub-section (2) of the new section is on the same lines as the old sub-section (3) excepting that the Supreme Court has been substituted for the High Court and the High Court for the Tribunal in the old section.

While the Act of 1956 was in force this Court had to go into the question as to whether section 29 (2) of the Limitation Act of 1908 would be applicable to an appeal preferred to the High Court from an order of the Tribunal. In *Vidyacharan Shukla* v. *Khubchand Baghel*[1], the main question before this Court was whether for

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1. (1964) 6 S.C.R. 129.

the purpose of computing the period of 30 days prescribed under section 116-A (3) of the Act, the provisions of section 12 of the Limitation Act could be invoked. The High Court had proceeded on the basis that section 29 (2) applied to the case of appeals under section 116-A of the Act and on that basis had held that the appeal was within time if it was computed after making the deductions permitted by section 12 of the Limitation Act. There was a good deal of discussion in the case about the scope and extent of section 29 (2). We are not concerned with that in the present appeal. According to the learned Chief Justice and Ayyangar, J.

> "even on the narrowest construction of the words 'different from those prescribed therefor in the First Schedule' occurring in the opening part of section 29 (2), the exclusion of time provided for by Article 12 of the Limitation Act would be permissible in computing the period of limitation for filing the appeal to the High Court..............."

Subba Rao, J. (as he then was) took the view that section 116-A did not provide an exhaustive and exclusive code of limitation and did not exclude the general provisions of the Limitation Act. The majority view was that though the right of appeal was conferred by section 116-A of the Act of 1951 it was still an appeal under the Code of Civil procedure and to attract Article 156 of the First Schedule to the Limitation Act, it was not necessary for an appeal to be an appeal under the Code of Civil Procedure in that the right to prefer the appeal should be conferred by the said Code. In our view, sub-section (2) of section 116-A empowered the High Court to treat an appeal under that section presented to it as if it were an appeal from an original decree passed by a Court within the local limits of its civil appellate jurisdiction. Consequently, the jurisdiction, powers and authority of the High Court would be the same as in an appeal from an original decree of a lower Court. In other words, in entertaining the appeal and disposing of it the High Court could exercise the same powers as were available to it in an appeal from a decree of a lower Court. To such an appeal the powers of the High Court under section 12 of the Limitation Act would necessarily be attracted.

Mr. Ram Reddy attempted to press that decision into service in the appeal before us. In our view, the situation now obtaining in an appeal to this Court from an order of the High Court is entirely different There is no section in the Act as it now stands which equates an order made by the High Court under section 98 or section 99 to a decree passed by a civil Court subordinate to the High Court. An appeal being a creature of a statute the rights conferred on the appellant must be found within the four corners of the Act. Sub-section (2) of the present section 116-A expressly gives this Court the discretion and authority to entertain an appeal after the expiry of the period of thirty days. No right is however given to the High Court to entertain an election petition which does not comply with the provisions of section 81, section 82 or section 117.

It was argued that if a petition were to be thrown out merely because a necessary party had not been joined within the period of 45 days no enquiry into the corrupt practices alleged to have been committed at certain elections would be possible This is however a matter which can be set right only by the Legislature. It is worthy of note that although the Act has been amended on several occasions, a provision like section 86 (1) as it now stands has always been on the statute book but whereas in the Act of 1951 the discretion was given to the Election Commission to entertain a petition beyond the period fixed if it was satisfied as to the cause for delay no such saving clause is to be found now The Legislature in its wisdom has made the observance of certain formalities and provisions obligatory and failure in that respect can only be visited with a dismissal of the petition.

It is to be noted however that even though the Indian Limitation Act, 1963, does not apply to an election petition provisions like sections 9 and 10 of the General Clauses Act, 1897 providing for computation of time which are *in pari materia* with sections 12 (1) and 4 of the Limitation Act would apply to such a petition.

The last submission of Counsel for the appellants was that the failure to implead V. K. Reddi did not make the election petition liable to dismissal under section 86 (1). It was argued that after V. K. Reddi had withdrawn from contest he was no longer a candidate within the meaning of section 79 (*b*) or 82 (*b*) of the Act. In our opinion it is not open to him to argue that point in view of the decision of this Court in *Har Swarup* v. *Brij Bhushan*[1]. It is to be noted that this decision does not stand by itself. In *Mohan Singh* v. *Bhanwarlal*[2], an attempt was made to get the election petition dismissed *in limine* on the ground that one of the candidates at the election, namely, Himmat Singh, against whom allegations of corrupt practice were made in regard to withdrawal of his candidature was not joined as a respondent. It was held by this Court that a mere offer to help in getting employment was not an offer of gratification within the meaning of section 123 (1) (*B*) of the Act. The Court however observed:

> " If therefore the petition contained any imputation of corrupt practice made against Himmat Singh, it could not be regarded as properly constituted unless he was impleaded as a respondent, for by the definition of ' candidate ' in section 79 (*b*), the expression ' any other candidate ' in section 82 (*b*) must include a candidate who had withdrawn his candidature." (see at p. 18).

Reference may also be made to *Amin Lal* v. *Hunna Mal*[3].

It was however sought to be argued that section 99 enjoined upon the High Court to name all persons who had been proved at the trial to have been guilty of any corrupt practice and where such a person was not a party to the petition, he was not to be so named unless he had been given notice to appear before the High Court and asked to show cause why he should not be so named and if he chose to appear, he was to be given an opportunity of cross-examining any witness already examined by the High Court and of calling evidence in his own defence and of being heard. This provision, to our mind, only enjoins upon the High Court to give an opportunity to a person sought to be held guilty of a corrupt practice if he was not a party to the petition, but it does not apply to a person who is a necessary party thereto. An obvious case for the use of powers under section 99 would be that of an agent guilty of commission of a corrupt practice with the consent of the candidate. Such a person would not be a necessary party to the petition but he must have an opportunity of showing cause and of being heard before the High Court can name him as guilty of a corrupt practice while making an order under section 98.

In our opinion, the appeal has no merits and must be dismissed with costs.

S.V.J. *Appeal dismissed.*

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1. (1967) 2 S.C.J. 444 : (1967) 1 S.C.R. 342.
2. (1964) 5 S.C.R. 12.
3. (1966) 1 S.C.J. 43 : (1965) 1 S.C.R. 393.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

V. D. M. Rm. M. Rm. Muthiah Chettiar .. *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 16 (3) (a) (ii), 22 (2), 22 (5), 34 (1) (a), 34 (1) (b) and 40—Return of income—Individual—Partnership particulars—Non-disclosure of share incomes of wife and minor children—Whether amounts to failure to disclose "necessary" information—Validity of reassessment beyond four years.

Inclusion of share incomes of wife and minor children—Duty of the Income-tax Officer—No obligation on the taxpayer—Minor—Separate assessment on minor—Whether bars inclusion of minor's share income in father's assessment.

The assessee was a partner in a firm to the benefits of which his three minor sons had been admitted. For the assessment years 1952-53, 1953-54 and 1954-55 the assessee returned, among other income, his share income from the firm. The assessee, however, omitted to disclose in his returns the share incomes of his three minor sons. In Part III of the Form of Return the assessee disclosed the shares of the other partners and the minors in the firm, but did not disclose the relationship of the minors as his sons. The Income-tax Officer initially made assessments, merely on the basis of the assessee's returns for the three years in question. The minors represented by their mother as guardian had also filed with the same Income-tax Officer their individual returns disclosing their respective share incomes from the firm for the same three assessment years. The Income-tax Officer, acting on these returns, made separate assessments on the minors.

Later, however, the Officer initiated proceedings against the assessee under section 34 (1) (*a*) of the Indian Income-tax Act, 1922 for the assessment years 1952-53 and 1953-54 and under section 34 (1) (*b*) for the assessment year 1954-55, on the score that the minors' share incomes which had to be included in the assessee's total income under section 16 (3) (*a*) (ii) of the Act had escaped assessment. The Officer held that the information furnished by the assessee in his returns was not full in the sense that he had not stated that the minors were his sons, which information came to the Officer's possession only later. The Officer accordingly, made reassessments including the minors' share incomes in the assessee's total income for all the three years.

The assessee appealed against the assessments on two grounds: (*i*) that the reassessments under section 34 were not valid and (*ii*) that the direct assessments already made on the minors precluded the clubbing of their share incomes in the hands of the assessee under section 16 (3) (*a*) (ii). Both the contentions were rejected in appeal. The Tribunal held that section 34 (1) (*a*) was properly invoked for 1952-53 and 1953-54 and the reassessment under section 34 (1) (*b*) was made on information received. On a case stated by the Tribunal at the assessee's instance, the High Court answered both the questions against the assessee. On further appeal to the Supreme Court,

Held, that the notice of reassessment for 1954-55 under section 34 (1) (*b*) of the Income-tax Act, 1922 was competently issued by the Income-tax Officer against the assessee and there was no basis for the argument that the Officer had only changed the opinion in reopening the assessment.

As for 1952-53 and 1953-54, the reassessments made under section 34 (1) (*a*) was not valid in law.

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* C. As. Nos. 1457 to 1459 of 1968. 14th February, 1969.

The assessee is bound to disclose under section 22 (5) the names and addresses of his partners, if any, engaged in business, profession or vocation, together with the location and style of the principal place and branches thereof and the extent of the shares of all such partners in the profits of the business, profession or vocation and any branches thereof. But the assessee was not required, in making the return, to disclose that any income was received by his wife or minor child admitted to the benefits of partnership of a firm of which he was a partner.

Assuming that there were instructions in the Forms of Return in the relevant years instructing the assessee to disclose the income received by his wife and minor children from a firm of which the assessee was a partner, in the absence of any head under which the income of the wife or minor children could be shown, by not showing that income the taxpayer cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment.

Section 16 (3) imposes an oblgation upon the Income-tax Officer to compute the total income of any individual for the purpose of assessment by including the items of income set out in clauses (*a*) (i) to (iv) and (*b*), but thereby no obligation is imposed upon the taxpayer to disclose the income liable to be included in his assessment under section 16 (3).

Section 34 (1) (*a*) sets out the conditions in which the power may be exercised by the Income-tax Officer; it did not give rise to an obligation on the part of the taxpayer to disclose information which enabled the Income-tax Officer to exercise the power under section 16 (3) (*a*) (*ii*).

Also held: that the inclusion of the share income of the minor in the hands of the assessee by invoking section 16 (3) of the Act is valid in law notwithstanding that an assessment is made on the minor represented by his guardian.

Appeals from the Judgment and Order, dated the 21st August, 1964, of the Madras High Court in T.C. No. 75 of 1962 (Reference No. 50 of 1962)*.

M. C. Chagla, Senior Advocate (*T. A. Ramachandran*, Advocate, with him), for Appellant (In all the Appeals).

S.K. Aiyar and *B.D. Sharma*, Advocates, for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shah, J.—Ramanathan Chettiar, his son Muthiah Chettiar—called hereinafter for the sake of brevity, Muthiah—and Ramanathan, Annamalai and Alagappan, sons of Muthiah, constituted a Hindu undivided family. The family owned a 3/5th share in M.RM.S. Firm, Seramban in Malaya. The firm was assessed under the Indian Income-tax Act, 1922, in the status of a firm resident within the taxable territories. On 16th September, 1950, Muthiah separated from the family taking his 1/5th share in the M.RM.S. Firm. On 13th April, 1951 the status of the family became completely disrupted and the three sons of Muthiah took in equal shares the remaining 2/5th share—the grandfather Ramanathan taking no share in the M. RM.S. Firm.

For the assessment year 1952-53 Muthiah submitted a return of his income as an individual and stated under the head business income " Kindly ascertain his (assessee's) share of profit and remittances from the Income-tax Officer, Second Additional Circle—I, Karaigudi, in F. No. 6098-m/1952-53." In Part III of the return Muthiah supplied the following information about his partners :

Name and address of the firm.	*Name of each partner including assessee.*	*Share.*
Messrs. R. RM. S. Firm Seramban, F.M.S.	1. Assessee (Muthiah Chettiar)	60/303
	2. VD. M RM. M. RM.M. Ramanathan Chettiar (minor)	40/303
	3. VD. M. RM. M RM. M. Alagappan Chettiar (minor).	40/303

* (1965) 55 I.T.R. 147.

4.	VD. M. RM. M. RM. M. Annamalai Chettiar (minor).	40/303
5.	C.P.R.	60/303
6.	M.S S.	60/303
7.	Charity.	3/303.

For the assessment year 1953-54 in column 3 in section B of the return Muthiah stated: "Kindly ascertain the remittances from the Income-tax Officer, Fifth Additional, Karaikudi in F. No. 6098-m." and at page 3 of the return in column 3 of section F, it was stated:

"Assessee has 60/303 share in Messrs. R. RM. S. Joint Seramban (Malaya). Kindly ascertain share of profit or loss from the Income-tax Officer, Fifth Additional, Karaikudi in F. No. 6098."

In Part III of the return he set out the names of the partners as were mentioned in the return for 1952-53. Against the names of Ramanathan Chettiar, Alagappan Chettiar and Annamalai Chettiar it was not disclosed that they were minors.

For the assessment year 1954-55 at the foot of page 1 of the return Muthiah stated:

"The assessee has a remittance of Rs. 6,188-12-0, from R. RM. S. Firm. Seramban. His share of income may be taken from the firm's file."

and in Part III the names of seven partners as mentioned in 1952-53 return were set out—Ramanathan, Alagappan, Annamalai were not shown as minors.

Ramanathan, Alagappan and Annamalai—the three minor sons of Muthiah represented by their mother and guardian also filed returns of their respective income for the years 1952-53, 1953-54 and 1954-55 and disclosed therein their shares in the profit from the 2/5th share in the M. RM.S. Firm.

For the assessment years 1952-53, 1953-54, and 1954-55 the Income-tax Officer completed the assessments separately on the firm, on Muthiah as an individual and on the three minors represented by their mother and guardian. Muthiah was assessed in respect of his share in the income of the firm and from other sources. In his returns Muthiah had not disclosed the shares received by his minor sons and the Income-tax Officer did not in making the assessments include shares of the minors from the firm under section 16 (3) (*a*) (*ii*) of the Indian Income-tax Act, 1922. The Income-tax Officer issued notices of re-assessment to Muthiah under section 34 (1) (*a*) of the Income-tax Act, 1922, for the years, 1952-53 and 1953-54 and under section 34 (1) (*b*) for the year 1954-55. Muthiah filed returns under protest declaring the same income as originally assessed. In the view of the Income-tax Officer, Muthiah had not furnished in Part III, clause (*c*) of the return full facts regarding the other parties and in column 2 he had merely disclosed that Ramanathan, Alagappan and Annamalai were minors: that "infomation was not full in the sense that he had not stated that they were minor sons" of Muthiah. Accordingly the Income-tax Officer held that the income of the sons of Muthiah which should have been included under section 16 (3) (*a*) (*ii*) of the Income-tax Act had escaped assessment in Muthiah's hands and he brought that income to tax.

The Appellate Assistant Commissioner confirmed the order made by the Income-tax Officer. In appeal to the Tribunal it was contended by Muthiah that he had fully and truly disclosed all the particulars he was required to disclose in the returns of his income for the three years in question, and "section 34 (1) (*a*) had no application to the assessment years 1952-53 and 1953-54 and for 1954-55 the re-opening was based only on a change of opinion." Muthiah also contended that section 40 of the Income-tax Act was mandatory and since the Income-tax Officer had made separate assessments on the minors represented by their mother, no further assessment under section 16 (3) could be made, the two sections being mutually exclusive.

The Tribunal observed that for the first two years section 34 (1) (*a*) applied, that in respect of the year 1954-55 there was no change of opinion but the asses-

ment was made on information received within the meaning of section 34 (1) (*b*) of the Income-tax Act and that separate assessment of the minors did not stop the Income-tax Officer from assessing the income received by the minor sons in the hands of Muthiah. The Appellate Tribunal accordingly confirmed the order of the Appellate Assistant Commissioner.

At the instance of Muthiah the following questions were referred to the High Court of Madras:

"(*i*) Whether on the facts and in the circumstances of the case, the re-assessment made on the assessee under section 34 of the Act is valid in law for 1952-53 to 1954-55 ?

(*ii*) Whether on the facts and in the circumstances of the case, the inclusion of the share income of the minor in the hands of the assessee by invoking the provisions of section 16 (3) of the Act is valid in law notwithstanding that an assessment is made on the minor represented by his guardian."

The answer to the second question must, in view of the recent judgment of this Court in *C. R. Nagappa* v. *The Commissioner of Income-tax, Mysore*[1], be in the affirmative.

In considering the first question it is necessary to refer to certain provisions of the Income-tax Act, 1922. By section 3 the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually was charged to tax for that year in accordance with, and subject to the provisions of the Act at any rate or rates prescribed by the Finance Act. "Total income" was defined in section 2 (15) as meaning "total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in this Act." Section 4 (1) set out the method of computation of total income ; it enacted :

"(1) Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(*a*) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person, or

(*b*) if such person is resident in the taxable territories during such year,—

(i) accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year, or

* * * *"

Section 22 by sub-section (1) required the Income-tax Officer to give notice by publication in the press in the prescribed manner, requiring every person whose total income during the previous year exceeds the maximum exempt from tax, to furnish a return in the prescribed form setting forth his total income. Sub-section (2) authorised the Income-tax Officer to serve a notice upon a person whose income in the opinion of the Income-tax Officer exceeded the minimum free from tax. Section 23 dealt with the assessment. It conferred power upon the Income-tax Officer to assess the total income of the assessee and to determine the sum payable by him on the basis of such return, submitted by him. Rule 19 framed under section 59 of the Income-tax Act, 1922, required the assessee to make a return in the form prescribed thereunder, and in Form *A* applicable to an individual or a Hindu undivided family or an association of persons there was no clause which required disclosure of income of any person other than the income of the assessee, which was liable to be included in his total income. The Act and the Rules accordingly imposed no obligation upon the assessee to disclose to the Income-tax Officer in his return information relating to income of any other person by law taxable in his hands.

But section 16, sub-section (3) provided that in computing the total income of any individual for the purpose of assessment there shall be included the classes of income mentioned in clauses (*a*) and (*b*). Sub-section (3) (*a*) (*ii*) in so far as it is material, provided:

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1. (1969) 2 I.T.J. 347 : (1969) 73 I.T.R. 626.

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

(i) . . . . . .

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner."

The assessee was bound to disclose under section 22 (5) the names and addresses of his partners, if any, engaged in business, profession, or vocation together with location and style of the principal place, and branches thereof and the extent shares of all such partners in the profits of the business, profession or vocation and any branches thereof, but the assessee was not required, in making a return to disclose that any income was received by his wife or minor child admitted to the benefits of partnership of a firm of which he was a partner.

Counsel for the Commissioner contended that in the forms of returns prescribed in the "Notes of Guidance" for drawing up the return were printed, and thereby the assessee was informed that he had to disclose the income received by his wife and minor children from a firm of which the assessee was a partner. Counsel has however not placed before the Court the forms of return in vogue in the relevant year of assessment. In the Income-tax Manual published under the authority of the Central Government in 1945 under clause (3) printed at page 185 the assessee is advised to include in the return, under the appropriate head, certain classes of income which are liable to be included in the assessment of an individual under section 16, and income liable to be taxed under sections 41-D, 44-E and 44-F. This instruction was repeated in the Manual Parts II and III at pages 344 and 345 in the 10th Edition published in 1950. But in the 11th Edition of the Manual published in 1954 no such instructions were printed. About the date on which the instructions were deleted. Counsel for the Commissioner was unable to give any information. Assuming that there were instructions printed in the Forms of return in the relevant years, in the absence of any head under which the income of the wife or minor child of a partner whose wife or a minor child was a partner in the same firm, could be shown, by not showing that income the taxpayer cannot be deemed to have failed or omitted to disclose fully and truly all material facts necessary for his assessment. Section 16 (3) imposes an obligation upon the Income-tax Officer to compute the total income of any individual for the purpose of assessment by including the items of income set out in clauses (*a*) (*i*) to (*iv*) and (*b*), but thereby no obligation is imposed upon the taxpayer to disclose the income liable to be included in his assessment under section 16 (3). For failing or omitting to disclose that income, proceedings for reassessment cannot therefore be commenced under section 34 (1) (*a*). Section 22 (5) required the assessee to furnish particulars of the names and shares of his partners, but imposed no obligation to mention or set out the income of the nature mentioned in section 16 (3). In the relevant years there was no head in the form under which income liable to be assessed to tax under section 16 (3) (*a*) and (*b*) could be disclosed.

We are in the circumstances unable to agree with the High Court that section 34 imposed an obligation upon the assessee to disclose all income includible in his assessment by reason of section 16 (3) (*a*) (*ii*). Section 34 (1) (*a*) sets out the conditions in which the power may be exercised; it did not give rise to an obligation to disclose information which enabled the income-tax Officer to exercise the power under section 16 (3) (*a*) (*ii*), nor had the use of the expression "necessary for his assessment" in section 34 (1) (*a*) that effect.

The High Court did not consider the question whether in the year 1954-55 the notice under section 34 (1) (*b*) was properly issued against Muthiah. The Tribunal in their Judgment observed:

"There is no basis for the argument that the Income-tax Officer had only changed his opinion and re-opened the assessment."

We agree with that view. The order of re-assessment was made well within four years from the date of the last day of the year of assessment 1954-55. The notice was therefore competently issued by the Income-tax Officer.

The order passed by the High Court, insofar as it relates to the years 1952-53 and 1953-54 is set aside and the answer in the negative is recorded. For the year 1954-55 the answer recorded by the High Court is confirmed. There will be no order as to costs throughout.

V.B. *Ordered accordingly.*

THE SUPREME COURT OF INDIA,

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

K. R. Chinna Krishna Chettiar .. *Appellant**

v.

Sri Ambal & Co. and another .. *Respondents.*

Trade and Merchandise Marks Act (XLIII of 1958), *sections* 2 (j) *and section* 12 (1)—*Registration of trade mark—' Andal ' and ' Ambal'—Deceptively similar in sound—Ocular Comparison not always the decisive test.*

Constitution of India (1950), *Article* 136—*Appeal by Special Leave—Concurrent finding of Court below—Onus on appellant to show that the finding is erroneous.*

There can be no doubt that the word ' Ambal ' is an essential feature of the trade marks. The common "Sri" is the subsidiary part of the two words "Ambal" is the more distinctive and fixes itself in the recollection of an average buyer with imperfect recollection.

It is for the Court to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. If the proposed mark is used in a normal and fair manner the mark would come to be known by its distinguishing feature "Andal". There is a striking similarity and affinity of sound between the words "Andal" and "Ambal" (held, there is real danger of confusion between the two marks.).

There is no evidence of actual confusion, but that might be due to the fact that the appellant's trade is not of long standing. There is no visual resemblance between the two marks, but ocular comparison is not always the decisive test. The resemblance between the two marks must be considered with reference to the ear as well as the eye. *Held*, there is a close affinity of sound between Ambal and Andal. The distinguishing feature of the respondents mark is Ambal while that of the Appellant's mark is Andal. The two words are deceptively similar in sound.

The name Andal does not cease to be deceptively similar because it is used in conjunction with a pictorial device.

The Hindus in the south of India may be well aware that the words Ambal and Andal represent the names of two distinct goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsis, Muslims and persons of other religious denominations. Moreover, their business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customer who use the respondent's goods will have recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite diety.

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*C.A. No. 749 of 1966. 14th April, 1969.

The Registrar has expert knowledge of such matters and his decision should not be lightly disturbed. But both the Courts have found that he was clearly wrong and held that there is a deceptive similarity between the two marks. In an appeal under Article 136 of the Constitution, the onus is upon the appellant to show that the concurrent finding of the Courts below is erroneous. The appellant must satisfy the Court that the conditions of section 12 (1) have been satisfied. If those conditions are not satisfied his mark cannot be registered.

Appeal by Special Leave from the Judgment and Order, dated the 21st November, 1962 of the Madras High Court in Letters Patent Appeal No. 57 of 1962.

A. K. Sen, Senior Advocate, (*K. Jayaram* and *R. Thiagarajan*, Advocates, with him), for Appellant.

M. C. Chagla, Senior Advocate (*N. K. Anand* and *M. P. Rao*, Advocates, and *O. C. Mathur*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Bachawat, J.—The appellant is the sole proprietor of a trading concern known as Radha and Co. The respondents Ambal and Co., are a partnership firm. The respondents as also the appellant are manufacturers and dealers in snuff carrying on business at Madras and having business activities inside and outside the State of Madras. On 10th March, 1958 the appellant filed application No. 183961 for registration of a trade mark in class 34 in respect of "snuff manufactured in Madras". The respondents filed a notice of opposition. The main ground of opposition was that the proposed mark was deceptively similar to their registered trade marks. The respondents were the proprietors of the registered marks Nos. 126808 and 146291 Trade mark No. 126808 consists of a label containing a device of a Goddess Sri Ambal seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal parimala snuff" at the top of the label, and the name and address "Sri Ambal and Co., Madras" at the bottom. Trade mark No. 146291 consists of the expression "Sri Ambal". The mark of which the appellant seeks registration consists of a label containing three panels. The first and the third panels contain in Tamil, Devanagiri, Telugu and Kannada the equivalents of the words "Sri Andal Madras Snuff". The centre panel contains the picture of Goddess Sri Andal and the legend, "Sri Andal".

Sri Andal and Sri Ambal are separate divinities. Sri Andal was a Vaishnavite woman saint of Srivilliputur village and was deified because of her union with Lord Ranganatha. Sri Ambal is the consort of Siva or Maheshwara.

The respondents have been in the snuff business for several decades and have used the word Ambal as part of their work for more than half a century. The question in issue is whether the proposed mark is deceptively similar to the respondents' marks. "Mark" as defined in section 2 (*j*) of the Trade and Merchandise Marks Act, 1958 includes "a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof." Section 12 (1) provides that "save as provided in sub-section (3), no trade mark shall be registered in respect of any goods or description of goods which is identical with or deceptively similar to a trade mark which is already registered in the name of a different proprietor in respect of the same goods or description of goods." The Registrar of Trade of Marks observed :—

> "In a composite mark the distinctive words, appearing on it play an important part. Words always talk more than devices, because it is generally by the word part of a composite mark that orders will be given. Apart from that, the opponents have a registered mark consisting of the expression Sri Ambal. I have, therefore, to determine whether the expression Sri Andal, is deceptively similar to Sri Ambal."

He held :

"the sound of "Ambal" does not so nearly resemble the sound of "Andal" in spite of certain letters being common to both the marks, as to be likely to cause confusion or deception among a substantial number of persons."

The respondents filed an appeal in the Madras High Court. Jagadishan, J. observed :

"It is settled law that a trade mark comprehends not merely the picture design or symbol but also its descriptive name. A copy or colourable imitation of the name, would constitute an infringement of the mark containing the name. Nobody can abstract the name or use a phonetical equivalent of it and escape the charge of piracy of the mark pleading that the visual aspect of his mark is different from the mark of the person opposing its registration."

He held :—

"The words, Ambal and Andal, have such great phonetic similarity that they are undistinguishable having the same sound and pronounciation. In whatever way they are uttered or spoken slowly or quickly, perfectly or imperfectly, meticulously or carelessly and whoever utters them, a foreigner or a native of India, wherever they are uttered in the noisy market place or in a calm and secluded area, over the phone or in person the danger of confusion between the two phonetically allied names is imminent and unavoidable."

Accordingly, he allowed the appeal and dismissed the appellant's application for registration of the trade mark. The appellant filed a letters patent appeal. The Divisional Bench of the High Court dismissed the appeal. The learned Registrar and the two Courts below concurrently found that the appellant failed to prove honest concurrent use so as to bring his case within section 12 (3). The present appeal has been filed by the appellant after obtaining Special Leave.

The Registrar was of the view that the appellant's mark was not deceptively similar to the respondent's trade marks. He has expert knowledge of such matters and his decision should not be lightly disturbed. But both the Courts have found that he was clearly wrong and held that there is a deceptive similarity between the two marks. In an appeal under Article 136 of the Constitution the onus is upon the appellant to show that the concurrent finding of the Courts below is erroneous. The appellant must satisfy the Court that the conditions of section 12 (1) have been satisfied. If those conditions are not satisfied this mark cannot be registered.

Now the words "Sri Ambal" form part of trade mark No. 126808 and are the whole of trade mark No. 146291. There can be no doubt that the word "Ambal" is an essential feature of the trade marks. The common "Sri" is the subsidiary part. Of the two words "Ambal" is the more distinctive and fixes itself in the recollection of an average buyer with imperfect recollection.

The vital question in issue is whether, if the appellant's mark is used in a normal and fair manner in connection with the snuff and if similarly fair and normal user is assumed of the existing registered marks, will there be such a likelihood of deception that the mark ought not to be allowed to be registered (see *In the matter of Broadhead's Application* for registration of a trade mark)[1]. It is for the Court to decide the question on a comparison of the competing marks as a whole and their distinctive and essential features. We have no doubt in our mind that if the proposed mark is used in a normal and fair manner the mark would come to be known by its distinguishing feature "Andal". There is a striking simillarity and affinity of sound between the words "Andal" and "Ambal." Giving due weight to the judgment of the Registrar and bearing in mind the conclusions of the learned Single Judge and the Divisional Bench, we are satisfied that there is a real danger of confusion between the two marks.

There is no evidence of actual confusion but that might be due to the fact that the appellant's trade is not of long standing. There is no visual resemblance between the two marks, but ocular comparison is not always the decisive test. The

1. (1950) 57 R.P.C. 209, 214.

resemblance between the two marks must be considered with reference to the ear as well as the eye. There is a close affinity of sound between Ambal and Andal.

In the case of *Coca-Cola Co. of Canada* v. *Pepsi Cola Co. of Canada Ltd.*[1], it was found that cola was in common use in Canada for naming the beverages. The distinguishing feature of the mark coca-cola was coca and not cola. For the same reason the distinguishing feature of the mark Pepsi Cola was Pepsi and not cola. It was not likely that any one would confuse the word Pepsi with coca. In the present case the word "Sri" may be regarded as in common use. The distinguishing feature of the respondent's mark is Ambal while that of the appellant's mark is Andal. The two words are deceptively similar in sound.

The name Andal does not cease to be deceptively similar because it is used in conjunction with a pictorial device. The case of *Decordova and others* v. *Vick Chemical Coy.*[2] is instructive. From the Appendix printed at page 270 of the same volume it appears that Vick Chemical Coy were the proprietors of the registered trade mark consisting of the word "Vaporub" and another registered trade mark consisting of a design of which the words "Vicks Vaporub Salve" formed a part. The appendix at page 226 shows that the defendants advertised their ointment as "Karsote Vapour Rub". It was held that the defendants had infringed the registered marks. Lord Radcliffe said: "...... a mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of its essential features."

Mr. Sen stressed the point that the words Ambal and Andal had distinct meanings. Ambal is the consort of Lord Siva and Andal is the consort of Ranganatha. He said that in view of the distinct ideas conveyed by the two words a mere accidental phonetic resemblance could not lead to confusion. In this connection he relied on *Venkateswaran's Law of Trade and Merchandise Marks*, 1963 Ed., page 214, *Kerly's Law of Trade-Marks and Trade Names*, 9th Ed., page 465, Article 852 and the decision *Application by Thomas A. Smith Ltd., to Register a trade mark*[3]. In that case Neville, J., held that the words "limit" and "summit" were words in common use, each conveying a distinctly definite idea; that there was no possibility of any one being deceived by the two marks; and there was no ground for refusing registration. Mr. Sen's argument loses sight of the realities of the case. The Hindus in the south of India may be well aware that the word Ambal and Andal represent the names of two distinct goddesses. But the respondent's customers are not confined to Hindus alone. Many of their customers are Christians, Parsees, Muslims and persons of other religious denominations. Moreover, there business is not confined to south of India. The customers who are not Hindus or who do not belong to the south of India may not know the difference between the words Andal and Ambal. The words have no direct reference to the character and quality of snuff. The customers who use the respondent's goods will have a recollection that they are known by the word Ambal. They may also have a vague recollection of the portrait of a benign goddess used in connection with the mark. They are not likely to remember the fine distinctions between a Vaishnavite goddess and a Shivaite deity.

We think the judgment appealed from is right and should be affirmed. We are informed that the appellant filed another application No. 212575 seeking registration of labels of which the expression "Radha's Sri Ambal Madras Snuff" forms a part. The learned Registrar has disposed of the application in favour of the appellant. But we understand that an appeal is pending in the High Court. It was argued that there was no phonetic similarity between Sri Ambal and Radha's Sri Andal and the use of the expression Radha's Sri Andal was not likely to lead to confusion. The Divisional Bench found force in this argument. But as the matter is subjudice we express no opinion on it.

In the result, the appeal is dismissed with costs.

S.V.J. —— *Appeal dismissed.*

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1. (1942) 59 R.P.C. 127.
2. (1951) 68 R.P.C. 103.
3. (1913) 30 R.P.C. 363.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, J. M. SHELAT, C. A. VAIDIALINGAM, K.S. HEGDE AND A. N. GROVER, JJ.

The State of Madras .. *Appellant**

v.

Davar & Co., etc. .. *Respondents.*

Madras General Sales Tax Act (I of 1959) and Central Sales Tax Act (LXXIV of 1956), section 5 (2)—Sea Customs Act (1878), section 3-A—Customs "frontier" in section 5 (2) of Central Act cannot be construed to mean "customs barriers"—Must be construe in accordance with notification issued under section 3-A of the Act read with the proclamation of the President of India, dated 22nd March, 1956.

The expression "Customs frontier" in section 15 of the Central Act cannot be construed to mean "Customs barrier" It must be construed in accordance with the notification issued by the Central Government under section 3-A of the Act, on 6th August, 1955 read with the Proclamation of the President of India dated 22nd March, 1956.

Held, on facts, the sales were effected by transfer of documents of title long after the goods had crossed the Customs frontier of India.

Appeals by Special Leave from the Judgment and Order dated the 17th July, 1963 of the Madras High Court in Tax Cases Nos. 29, 47, 132 and 160 of 1961 (Revision Nos. 16, 28, 81 and 98 of 1961).**

A. K. Sen, Senior Advocate; (*A.V. Rangam*, Advocate, with him), for Appellant.

R. Thiagarajan, for Respondent (In C.A. No. 1464 of 1967).

K. Jayaram, for Respondent (In C.A. No. 1465 of 1967).

The Judgment of the Court was delivered by

Vaidialingam, J.—These appeals, by Special Leave, by the State of Madras, are directed against the common judgment, dated 17th July, 1963 of the Madras High Court.

The short question, that arises for consideration in these appeals, is as to whether the turnover, which was the subject of consideration by the High Court, was liable for sales tax, under the Madras General Sales Tax Act, 1959 (I of 1959) (hereinafter called the Madras Act). The assessees claimed that the turnover in question represented sales in the course of import and, as such, not liable to tax under the Madras Act. The State of Madras claimed that in all these cases the sale had been effected by a transfer of documents of title to the respective buyers after the ships had crossed the territorial waters and hence they were liable to tax under the Madras Act. The contention of the assessees was negatived by the Assistant Commercial Tax Officer, as also by the Appellate Assistant Commissioner of Commercial Taxes. But, on further appeal by the assessees, the Sales Tax Appellate Tribunal accepted their contention and held that the disputed turnovers were not liable to tax under the Madras Act. The revisions filed by the State against the orders of the Sales Tax Appellate Tribunal were dismissed by the High Court. Hence these appeals.

Though each of the respondents in these appeals is an importer of a different commodity, the pattern adopted by each of them in the matter of importing the goods concerned form foreign countries and in the matter of transferring title to the respective buyers, is more or less the same. We shall therefore refer only to the facts relating to the dealings adopted by Davar and Company (hereinafter called the assessee), the respondent in Civil Appeal No. 1462 of 1967.

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* C.As. Nos. 1462 to 1465 of 1967. 20th May, 1969.

** (1963) 14 S.T.C. 904.

The assessee was assessed by the Assistant Commercial Tax Officer, South Madras and Chingleput, under the Madras Act on a turnover of Rs. 6,60,200.07 for the year 1957-58. It was carrying on business in timber at Madras and in the course of its business the assessee imported timber from Burma and sold it to its customers in India. Out of the turnover above-mentioned, the assessee disputed its liability to the extent of a turnover of Rs. 1,95,490.67 on the ground that the said amount represented sales in the course of import and that such sales were not liable to tax as they were covered by Article 286 (1) (*b*) of the Constitution. This claim was based on the following circumstances. The respondent-assessee entered into contracts for sale of timber with a firm of merchants called Velu and Brothers (hereinafter called the buyers). The timber was to be imported from Burma. Under the contract the buyers were to pay the assessee 8 per cent. profit on the C.I.F. value of timber sold and also the sales tax and other charges and expenses. The buyers were to retire the shipping documents at least 10 days before the expected arrival of the steamer carrying the timber. The assessee imported two consignments of timber from Rangoon. The value of the first consignment was Rs. 99,098.05. The ship carrying the consignment arrived at the Madras Harbour on 17th October 1957. The assessee got Rs. 1,00,000, from the buyers on 24th October, 1957, and retired the documents of title, from the bank and handed over the said documents on the same date to the buyers to enable them to clear the goods. All charges and expenses by way of import duty, clearance charges etc., were paid by the buyers on behalf of the assessee. A second consignment reached Madras by ship on 17th December, 1957. The assessee obtained from the buyers, on 23rd December, 1957 the value of this consignment after handing over to the buyers the necessary shipping documents.

On these facts both the Commercial Tax Officer as well as the Appellate Assistant Commissioner came to the conclusion that the sales effected by the assessee to the buyers were not sales in the course of import, but were local sales liable to tax under the Madras Act. The Sales Tax Appellate Tribunal, on the other hand, held to the contrary. The High Court has concurred with the view of the Appellate Tribunal.

According to the Assistant Commercial Tax Officer and the Appellate Assistant Commissioner the sale was effected by the assessee to the buyer after the consignment of timber had come into the Madras Port and in consequence there was no intention to transfer the property in the goods to the buyers before they were cleared from the customs frontier and hence the sales could not be considered to be sales in the course of import. The Appellate Tribunal took the view that the sale by the assessee to the buyers had been effected by transfering the documents of title relating to the goods before the goods, crossed the customs barrier and before the import became complete. Therefore, according to the Tribunal, the sales should be treated as being in the course of import and, in consequence, not liable for tax under the Madras Act.

On the facts stated above, the parties were not in dispute; but, before the High Court, the State raised the contention that the sales in qeustion were not sales in the course of import as the documents of title were handed over by the assessee to the buyers after the ship had crossed the 'territorial waters'. According to the State, the expression 'customs frontier,' occurring in section 5 (2) of the Central Sales Tax Act, 1956 (LXXIV of 1956), (hereinafter called the Central Act) is co-terminous with the extent of the territorial waters' of India, as fixed by the Proclamation, dated 22nd March, 1956 issued by the President of India. That is according to the State, the import is complete when the ship carrying the goods from a foreign port enters the territorial waters and any sale by the importer by transfer of documents of title to the goods subsequent to such entry will not amount to a sale in the course of import. According to the assessee 'customs frontier' in section 5 (2) of the Central Act must be treated as analogous to customs barrer and so read the position would be that a sale effected by transfer of documents of title before the goods cross the customs barrier' would not be liable to tax under the Madras Act.

The High Court has, after a reference to various decisions of this Court as to when a sale can be considered to be in the course of import or export, held that the 'customs frontier' as laid down by this Court does not mean any geographical features like land or coast or limits of territorial waters, but only the operation of the machinery of the Customs Department consisting of levy and collection of duty and clearance of the goods. The High Court further held that it would be proper to construe the words 'customs frontiers' as 'customs barriers' in the Central Act. In this view the High Court held that as the sale had been effected by transfer of title to the goods before they entered the customs barrier the sale was not liable to tax under the Madras Act.

On behalf of the appellant-State, Mr. A.K. Sen, learned Counsel, urged that the view of the Madras High Court construing the words 'customs frontiers' as 'customs barriers' in the Central Act was erroneous. According to the learned Counsel on the admitted facts the sales in all these cases had been effected by transfer of the documents of title long after the sales had ceased to be in the course of import. This contention, on behalf of the State, was resisted by Mr. Thiagarajan and Mr. K. Jaya Ram appearing for the respondent in Civil Appeals Nos. 1464 and 1465 of 1967 respectively.

We are of the view that the judgment of the Madras High Court cannot be sustained and the expression 'customs frontiers' in section 5 of the Central Act cannot be construed to mean 'customs barriers'. Article 286 (1) places a ban on the State imposing or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of import of goods into or export of goods out of the territory of India. Clause (2) of Article 286 gives power to the Parliament, by law, to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1). Accordingly Parliament has enacted the Central Act. Section 5 of that Act lays down the conditions under which a sale or purchase of goods can be said to take place in the course of import or export. Sub-sections (1) and (2) deal with sale or purchase of goods in the course of export and sale or purchase of goods in the course of import, respectively. As we are concerned with a sale in the course of import, the relevant provision is sub-section (2) of section 5, which is as follows :

> "5. (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

In this case, the claim made by the assessee for exemption from tax liability is on the ground that the sale was effected by transfer to the buyer of documents of title to the goods. Under section 5 (2) of the Central Act, in order to treat the sale as one in the course of import the documents of title must have been transferred before the goods have crossed the customs frontiers of India. The question is what does the expression 'customs frontiers' or India in section 5 of the Central Act, mean ? To answer this question, it is necessary to refer to certain Proclamations made by the President of India and Notifications issued by the Central Government under section 3-A of the Sea Customs Act, 1878 (VIII of 1878) (hereinafter called the Act).

The President of India has issued a Proclamation, dated 22nd March, 1956 and that contains a declaration as to the extent of the territorial waters of India. That Proclamation has been published with the notification of the Government of India in the Ministry of External Affairs, No. S.R.O. 669, dated 22nd March, 1956 and is as follows :

> "*S.R.O.* 669.—The following proclamation by the President is published for general information.

PROCLAMATION.

"WHEREAS international law has always recognised that sovereignty of a State extends to a belt of sea adjacent to its coast ;

AND WHEREAS international practice is not uniform as regards the extent of this sea-belt commonly known as the territorial waters of the State, and consequently it is necessary to make a declaration as to the extent of the territorial waters of India ;

I, Rajendra Prasad, President of India, in the Seventh Year of the Republic, do hereby proclaim that, notwithstanding any rule of law or practice to the contrary which may have been observed in the past in relation to India or any part thereof, the territorial waters of India extend into the sea to a distance of six nautical miles measured from the appropriate base line."

RAJENDRA PRASAD.
President".

On 30th September, 1967 another Proclamation was issued by the President of India and published with the notification of the Government of India in the Ministry of External Affairs, No. F.L./111 (1) of 1967, dated 30th September 1967. By this Proclamation the earlier Proclamation of 22nd March, 1956 has been superseded and the territorial waters of India have been declared to extend into the sea to a distance of twelve nautical miles measured from the appropriate base line. But in the present appeals, we are concerned only with the earlier Proclamation dated 22nd March, 1956.

Section 3-A of the Act gives power to the Central Government, to define, by notification in the Official Gazette, the 'customs frontiers' of India. By virtue of the powers conferred by this section, the Central Government (Ministry of Finance, Revenue Division) had issued a notification No. 25-Customs, dated 1st April, 1950, defining the 'customs frontiers' of India; but it is not necessary to consider the definition contained in this notification, as it has been superseded by the issue of a fresh Notification No. S.R.O. 1683, dated 6th August, 1955. The latter notification, issued by the Ministry of Finance (Revenue Division), Customs, which is relevant for the present purpose, is as follows :

"*New Delhi, the 6th August*, 1955.

S.R.O. 1683.—In exercise of the powers conferred by section 3-A of the Sea Customs Act, 1878 (VIII of 1878), and in supersession of the notification of the Government of India in the Ministry of Finance (Revenue Division) No. 25-Customs, dated the 1st April, 1950, the Central Government hereby defines the customs frontiers of India as the boundaries of the territory, including territorial waters, of India.

(Sd.)
Jt. Secretary."

The expression 'customs frontiers of India' in section 5 of the Central Act, in our opinion, must be construed in accordance with the notification issued by the Central Government under section 3-A of the Act, on 6th August, 1955 read with the Proclamation of the President of India, dated 22nd March, 1956. So applying the definition of 'customs frontiers' it is clear that, in the instant case, the sales were effected by transfer of documents of title long after the goods had crossed the customs frontiers of India. We have already stated that the ships carrying the goods in question were all in the respective harbours within the State of Madras when the sales were effected by the assessees by transfer of documents of title to the buyers. If so, it follows that the claims made by the assessees that the sales in question were sales in the course of import, has been rightly rejected by the assessing authority. Unfortunately, though various aspects seem to have been pressed before the High Court by the State of Madras, this notification of 6th August, 1955, issued by the Government of India, defining the 'customs frontiers' of India, was not brought to the notice of the High Court.

In the result, the common order, dated 17th July, 1963 of the Madras High Court is set aside and the appeals allowed. In the circumstances of the case, there will be no order as to costs.

S.V.J. — *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT : —J. M. SHELAT AND V. BHARGAVA, JJ.

The Praga Tools Corporation ... *Appellant**

v.

C. V. Imanual and others ... *Respondents.*

Constitution of India (1950), *Article* 226— *Writ of* mandamus—*When can lie—Company non-statutory body incorporated under Companies Act—Whether writ of* mandamus *lies against the company—Agreement between company and its workmen—Court holding writ of* mandamus *against company not maintainable but declaring agreement to be illegal and void—Validity of—No relief by way of declaration as to invalidity of agreement can be granted.*

No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of *habeas corpus mandamus*, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a *mandamus* his to secure the performance of a public or Statutory Body in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for *mandamus* will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligaticns owed by a company towards its workmen or to resolve any dispute. The condition precedent for the issue of *mandamus* is that there is one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of *mandamus* is, in form, a command directed to a person, corporation or/and inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A *mandamus* can issue to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporation to carry out duties placed on them by the statute authorising their undertakings. A *mandamus* would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities.

On facts held, the company being a non-statutory body and one in corporated under the Companies Act there was neither a statutory nor public duty imposed on it by a statute in respect of which enforcement could be sought by means of a *mandamus*, nor was therein its workmen any corresponding legal right for enforcement of any such statutory or public duty held. The High Court was right in holding that no writ petition for a *mandamus* or an order in the nature of *mandamus* could lie against the company.

Declaration of invalidity can be issued against a person or an authority or a Corporation where the impugned act is in violation of or contrary to a statute under which it is set up or governed or a public duty or responsibility imposed on such person, authority or body by such a statute.

Once the writ petition was held to be misconcieved on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration

*C.A. No. 612 of 1966. 19th February, 1969.

against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. Held, The High Court was in error in granting the said declaration.

Appeal by Special Leave from the Judgment and Order dated the 16th April, 1965 of the Andhra Pradesh High Court in Writ Appeal No. 37 of 1964.*

S. V. Gupte, Senior Advocate (*R. Thaiagarajan*, Advocate of *M/s. Aiyar & Aiyar*, with him), for Appellant.

Janardan Sharma, for Respondents Nos. 1 to 3.

The Judgment of the Court was delivered by

Shelat, J.—The Praga Tools Corporation (hereinafter referred to as the company) is a company incorporated under the Indian Companies Act, 1913. At the material time, however, the Union Government and the Government of Andhra Pradesh between them held 56 per cent and 32 per cent of its shares respectively and the balance of 12 per cent shares were held by private individuals. Begin the largest shareholder, the Union Government had the power to nominate the company's directors. Even so, being registered under the Companies Act and governed by the provisions of that Act, the company is a separate legal entity and cannot be said to be either a Government Corporation or an industry run by or under the authority of the Union Government.

At the material time there were two rival workmen's unions in the company, the Praga Tools Employees' Union and the Praga Tools Corporation Mazdoor Sabha (hereinafter referred to as the union and the sabha respectively). On 1st July, 1961 a settlement was arrived at between the company and the said union under which the workmen *inter alia* agreed to observed industrial truce for a period of three years and not to resort to strikes, stoppage of work or go-slow tactics. On 10th December, 1962 the company and the said union entered into a supplementary settlement under which the company agreed not to retrench or lay-off any of the workmen during the said period of truce on an assurance from the said union of co-operation and willingness of the workmen to carry out alternative tasks assigned to them even if they were in a slightly lower cadre without loss of emoluments. The said two settlements were arrived at and recorded in the presence of the Commissioner of Labour under sections 2 (*p*) and 18 (1) of the Industrial Disputes Act, 1947 and were to be in force as aforesaid until 1st July, 1964. On 20th December, 1963, however, the company entered into an agreement with the said union to which the said sabha was not a party. The agreement recited that there were several disputes between the company and the union and that some of them were the subject-matter of conciliation proceedings and some were pending arbitration or adjudication. Clause (1) provided that the said agreements dated 1st July, 1961 and 10th December, 1962 to the extent that they were inconsistent with this agreement would stand automatically repealed or modified by this agreement. Clause (6) stated that there was an immediate, unavoidable need for reducing substantially the overhead expenditure of the company and for effecting economy and therefore notwithstanding the agreement dated 10th December, 1962 "both the parties have prepared a list of the categories and persons who would be retrenched after careful consideration." The said list was attached to the agreement as Annexure VI. Clause (6) also provided that the agreement dated 10th December, 1962 stood modified so as to allow the said retrenchment to take place immediately in accordance with law. The clause further provided that in order to mitigate the consequences of the proposed retrenchment the company had evolved a scheme of voluntary retirement with terminal benefits superior to those provided under the Industrial Disputes Act, but the scheme of voluntary retirement would be available to the workmen only for a period of 10 days from the date of the agreement. It further provided that the company and the said union had agreed that an attempt

* I.L.R. (1967) A.P. 361.

would be made to rehabilitate the retrenched persons by helping them to obtain alternative employment and the company had for the purpose contacted public sector and other industries and in particular the Heavy Engineering Corporation, Ranchi for absorption as far as possible of the retrenched personnel. The effect of this agreement was to enable the company, notwithstanding the two earlier settlements, to carry out retrenchment of 92 workmen mentioned in Annexure VI thereto with effect from 1st January, 1964.

Respondent 1 and 40 other workmen thereupon filed a writ petition under Article 226 in the High Court of Andhra Pradesh challenging the validity of the said agreement impleading therein the company, the said union and the Regional Assistant Commissioner as respondents. The petition claimed a writ of *mandamus* or an order in the nature of *mandamus* or any other order or direction restraining the respondents to implement or enforce the said agreement. The writ petition was in the first instance heard by a learned Single Judge of the High Court before whom the workmen raised the following contentions; (1) that the said agreement dated 20th December, 1963 was invalid as it was entered into by the union in collusion with the company and was in violation of the said two earlier settlements, (2) that there could be no industrial dispute within the meaning of section 2 (*k*) of the Act as the said two earlier settlements, not having been terminated under section 19 (2), were in force, that therefore there could not be a valid conciliation under section 12 and accordingly the fact of the Conciliation Officer having signed the impugned agreement gave no binding force to it, (3) that the retrenchment of the 92 workmen was illegal and void as it was in breach of section 25 (*f*) inasmuch as no notice thereof was given to the appropriate Government, and (4) that the company being under the management of the Union Government, the appropriate Government in regard to the dispute was the Central Government and not the State Government and consequently the impugned agreement which was signed by the Conciliation Officer appointed by the State Government was not valid and no retrenchment could validly be effected under the force of such agreement.

The learned Single Judge negatived these contentions holding that the company was neither an industry run by or under the authority of the Union Government nor under its management but being a company registered under the Companies Act the appropriate Government was the State Government. He also held that there was no proof of the said union having entered into the impugned agreement in collusion with the company. He further held that the union by its letter dated 5th April, 1963, had raised an industrial dispute and had thereby requested that the question of retrenchment should be settled between the parties, that the said dispute with the consent of the company and the union was brought for conciliation before the Conciliation Officer and that the impugned agreement, having been brought about in the course of the said conciliation proceedings, was binding on all workmen including the petitioners in the writ petition despite the fact that they were members of the Sabha and not of the Union. In this view the learned Single Judge held that it was not necessary for him to decide the preliminary objection raised by the company that no writ petition for a *mandamus* could lie against it. He dismissed the writ petition on merits on the basis of the aforesaid findings given by him. 28 out of the said 41 workmen who had filed the writ petition filed a Letters Patent Appeal against the said judgment. The Division Bench of the High Court which heard the appeal held; (1) that since the dispute relating to the company's right to retrenchment was already settled under section 18 (1) by the said supplementary settlement of 10th December, 1962. no industrial dispute could be said to exist or arise until the said settlement was duly terminated under section 19 (2), that therefore there could be no valid conciliation proceedings in respect of the question of retrenchment and that the impugned agreement permitting the company to retrench, though it bore the signature of the Conciliation Officer, was not a valid agreement; (2) that so long as the earlier settlements were not terminated they held the field, and (3) that the said letter dated 5th April, 1963 relied on by the learned Single Judge as having raised an industrial dispute regarding retrenchment did not in fact contain or raise any such question. The Division Bench held that the said

letter raised only the question of revision of wage-structure and other demands but not the question of retrenchment. The letter of 29th July, 1963 of the Conciliation Officer to the company relied on by the company also referred to the demands contained in the said letter of 5th April, 1963, namely, the revision of wage-structure dearness allowance, promotion and other matters, but not the question of the company's right of retrenchment. The Division Bench therefore held that there was nothing on record to show that retrenchment was the subject-matter of any conciliation before the conciliation officer and therefore any agreement conferring on the company the right to retrench so long as the said earlier settlements were not terminated was invalid in spite of the Conciliation Officer having given his assent to and affixed his signature on it. The learned Judges, however, held that the company being one registered under the Companies Act and not having any statutory duty or function to perform was not one against which a writ petition for a *mandamus* or any other writ could lie. No such petition could also lie against the conciliation officer as on the facts of the case that officer did not have to implement the impugned agreement. The Division Bench, however, held that though the writ petition was not maintainable it could grant a declaration in favour of three workmen, namely, appellants 6, 16 and 25 before it, that the impugned agreement was illegal and void and dismissed the writ petition subject to the said declaration. The company challenges in this appeal by Special Leave the validity of this judgment making such a declaration.

Thus the only question which arises in this appeal is whether in the view that it took that the writ petition was not maintainable against the company the High Court could still grant the said declaration.

In our view the High Court was correct in holding that the writ petition filed under Article 226 claiming against the company *mandamus* or an order in the nature of *mandamus* was misconceived and not maintainable. The writ obviously was claimed against the company and not against the Conciliation Officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of *habeas corpus*, *mandamus*, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a *mandamus* lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for *mandamus* will not lie for an order of re-instatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. [See *Sohan Lal* v. *Union of India*[1]]. In *Regina* v. *Industrial Court and others*[2], *mandamus* was refused against the Industrial Court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a Minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J. in *R.* v. *Lewisham Union*[3], "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a *mandamus*. It has always required that the applicant for a *mandamus* shoud have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of *mandamus* is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of *mandamus* is, in from, a command directed to a person, Corporation or an inferior tribunal requiring him or them to do a particular thing thirein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an

1. (1957) S.C.J. 489 : (1957) 2 An.W.R. (S.C.) 50 : (1957) 2 M.L.J. (S.C.) 50 : (1957) S.C.R. 738.
2. (1965) 1 Q.B. 377.
3. (1897) 1 Q.B. 498, 501.

official body. A *mandamus* can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or Corporations to carry out duties placed on them by the statutes authorising their undertakings. A *mandamus* would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities Cf. *Halsbury's Laws of England* (3rd Edn.), Vol. II, page 52 and onwards].

The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a *mandamus*, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court therefore, was right in holding that no writ petition for a *mandamus* or an order in the nature of *mandamus* could lie against the company.

The grievance of the company, however, is that though the High Court held rightly that no such petition was maintainable, it nevertheless granted a declaration in favour of three of the said workmen, a declaration which it could not issue once it held that the said writ petition was misconceived. The argument was that such a declaration, if at all, could only issue against public bodies or companies or Corporations set up or controlled by statutes in respect of acts done by them contrary to or in breach of the provisions of such statutes. If a public authority purports to dismiss an employee otherwise than in accordance with mandatory procedural requirements or on grounds other than those sanctioned by the statute the Courts would have jurisdiction to declare its act a nullity. Thus, where a Hospital Services' Board dismissed a clerk for reasons not authorised by the relevant conditions of service a declaration was granted to the applicant by the House of Lords. [*Mc. Chelland* v. *Northern Ireland General Healta Services Boards*[1]]. Even where the statutory power of dismissal is not made subject to express procedural requirements or limited to prescribe grounds Courts have granted a declaration that it was invalidly exercised if the authority has failed to observe rules of natural justice or has acted capriciously or in bad faith or for impliedly unauthorised purposes. [See *Ridge* v. *Raldwin*[2] and *Short* v. *Poole Corporation*[3]]. Declarations of invalidity have often been founded on successful assertions that a public duty has not been complied with. [See *Attorney-General* v. *St. Ivs R.D.C.*[4]. It is, therefore, fairly clear that such a declaration can be issued against a person or an authority or a Corporation where the impugned act is in violation of or contrary to a statute under which it is set up or governed or a public duty or responsibility imposed on such person, authority or body by such a statute.

The High Court however, relied on two decisions of this Court as justifying it to issue the said declaration. The two decisions are *Bidi Bidi, Leaves and Tobacco Merchants' Association* v. *The State of Bombay*[5], and *A.B. Abdulkadir* v. *The State of Kerala*[6] But neither of these two decisions is a parallel case which could be relied on. In the first case, the declaration was granted not against a company, as in the present case, but against the State Government and the declaration was as regards the invalidity of certain clauses of a notification issued by the Government in pursuance of power under section 5 of the Minimum Wages Act, 1948 on the ground that the said clauses were beyond the purview of that section. In the second case also, certain rules made under the Cochin Tobacco Act of 1081 (M.E.) and the Travancore Tobacco Regulation of 1087 (M.E.) were declared void *hab initio*. These cases were therefore not cases where writ petitions were held to be not maintainable as having been filed against a company and despite that fact a declaration of invalidity of an impugned agrement having been granted. In our view once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or res-

1. (1957) 1 W.L.R. 594.
2. (1964) A.C. 40.
3. (1926) Ch. 66 at pp. 90 to 91.
4. (1961) 1 Q.B. 366.
5. (1962) 1 S.C.R. (Supp.) 381.
6. (1962) 2 S.C.R. (Supp.) 741 : (1963) 1 S.C.J. 75.

ponsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and is employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such declaration against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. The High Court, therefore, was in error in granting the said declaration.

The result is that the appeal must be allowed and the said declaration set aside. In the circumstances of the case we make no order as to costs.

S.V.J. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND A. N. GROVER, JJ.

S. Jhansi Lakshmi Bai and others .. *Appellants**

v.

Pothana Appa Rao and others .. *Respondents.*

Succession Act (XXXIX of 1925), section 105—Legacy—Legatee not surviving the testator—Lapse—Intention to exclude lapse, when can be inferred.

Bequest—Fund to be utilised in equal moieties for two purposes—Failure of one purpose if will result in a moiety of the amount devised falling into the residue.

The fund was devised for the construction of a Ramamandiram at Rajavaram village and for "celebrating the marriage and other auspicious functions" of Seetharatnam. Since no part of the fund was needed for the benefit of Seetharatnam, the legacy failed *pro-tanto* and fell into the residue. Under the will Mangamma, wife of the testator was made the owner the residue, but by her death during the lifetime of Appanna the residuary bequest lapsed and vested as on intestacy in the plaintiff and the 24th defendant. The devise of a moiety of the fund to be applied for the construction of a Ramamandiram however stands good and the trust must be carried out. Mangamma is dead, but on that account the charitable trust is not extinguished. The Trial Court must give appropriate directions for utilisation of that moiety for constructing a temple according to the direction of Appanna in the will.

Section 105 of the Indian Succession Act enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. It is difficult to agree that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105 (1) does not say, nor does it imply, that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency.

Appeal by Special Leave from the Judgment and Order, dated the 9th March, 1964 of the Andhra Pradesh High Court in Letters Patent Appeal No. 2 of 1963.

M. C. Chagla, Senior Advocate (*T. Satyanarayana*, Advocate with him), for Appellants.

P. Ram Reddy, Senior Advocate (*K. Jayaram*, Advocate with him), for Respondents.

* C.A. No. 445 of 1966. 17th March, 1969.

The Judgment of the Court was delivered by

Shah, J.—One Appanna died on 12th March, 1953, leaving him surviving no wife or lineal descendant. Subba Rao claiming to be the father's sister's son of Appanna instituted Suit No. 64 of 1953 in the Court of the Subordinate Judge, Eluru, for partition and separate possession of his half share in the properties described in Schedules A, B, C, D and E. The plaintiff claimed that Appanna died intestate, and that he and his brother Venugopala Rao were the nearest heirs entitled to the entire estate of Appanna. To this suit were impleaded Pothana Apparao (husband of the sister of Mangamma, wife of Appanna), his children, certain relations of Mangamma and the tenants on the lands in suit. Venugopala Rao was impleaded as the 24th defendant. The suit was defended by Pothana Apparao and others contending, *inter alia*, that Appanna had made and executed a will on 14th July, 1948, devising his property in favour of various legatees and the plaintiff's suit for a share in the property was on that account not maintainable. The trial Court held that Appanna of his free will and while in a sound state of mind had executed the will on 14th July, 1948, whereby he disposed of his properties described in Schedules A, B, C, D and E, but the Court held that the disposition of the property in Schedules C and E lapsed because Mangamma who was a legatee of the properties died before the testator, and that the direction in the will that whatever remained out of the Schedule E property after the lifetime of Mangamma shall pass to Venkataswamy and Seshagirirao defendants Nos. 3 and 2 respectively or their descendants was void and incapable of taking effect. The learned Judge accordingly passed a decree in favour of the plaintiff and the 24th defendant for possession of properties described in Schedules C and E.

In appeal to the High Court of Andhra Pradesh, Chandrasekhar Sastry, J., allowed the appeal filed by Pothana Apparao and his two sons Venkataswamy and Seshagirirao, and dismissed the claim of the plaintiff in respect of Schedules C and E properties. An appeal under the Letters Patent filed by the plaintiffs against the judgment of Chandrasekhar Sastry, J., was dismissed.

It has been concurrently found by all the Courts that when he was in a sound and disposing state of mind Appanna executed on 14th July, 1948, the will set up by the defendants. In an appeal with Special Leave this Court will not ordinarily allow a question about due execution to be canvassed, and our attention is not invited to any exceptional circumstances which may justify a departure from the rule.

The only question which survives for consideration relates to the true effect of the dispositions made by the will in respect of Schedule C and Schedule E properties. The relevant provisions of the will may first be set out :

"I am now about forty years of age. I do not have male or female issue. * * My wife is alive. * * and with the fear that I may not survive I have made the following provisions in respect of my immovable and movable properties to be given effect to.

* * * * *

I have given power to my wife Mangamma to sell the immovable property mentioned in the C Schedule hereunder and utilise the amount for celebrating the marriage and other auspicious functions of Tholeti Narasimha Rao's daughter Seetharatnam mentioned in the B Schedule and for constructing a *Ramamandiram* in Rajavaram village in my name.

* * * * *

The immovable property mentioned in the E Schedule hereunder shall be enjoyed by my wife Mangamma with all powers of disposition by way of gift, sale, etc. Whatever remains out of the said E Schedule mentioned immovable property after her lifetime, (the said property) shall pass either to the said Venkataswamy and Seshagiri or their descendants. * — * In the event of my wife taking a boy in adoption the property mentioned in the E Schedule hereunder

shall pass to the said adoptee with all powers of disposition by way of gift, sale etc., after her lifetime. * * *

If, for any reason, the properties and rights do not pass to the individuals mentioned in the aforesaid paras, such properties and rights shall be enjoyed by my wife Mangamma with absolute rights."

Appanna had directed his wife Mangamma to sell the properties described in Schedule C and to utilise the proceeds for two purposes, " celebrating the marriage and other auspicious functions " of Seetharatnam, and " for constructing a *Ramamandiram* in Rajavaram village " in his name. But the marriage of Seetharatnam was celebrated during the lifetime of Appanna, and expenses in that behalf were defrayed by Appanna, and no expenses remained to be incurred after the death of Appanna. Mangamma had no beneficial interest in Schedule C property. She was merely appointed to sell the property and to utilise the proceeds for the purposes specified in the will. The trial Judge clearly erred in holding that the estate lapsed because Mangamma died during the lifetime of Appanna. In the view of Chandrasekhar Sastry, J., since there was a joint request for two purposes, and one of the purposes for which the Schedule C properties were devised was accomplished by Appanna the bequest in its entirety must enure for the remaining purpose, *i.e.*, constructing a *Ramamandiram*, and the plaintiff's claim for possession of the C Schedule properties must fail. The learned Judges of the High Court agreed with that view.

But there was no " joint bequest " of the properties. In the absence of allocation of the amounts to be utilised for " celebrating the marriage and other auspicious functions " of Seetharatnam and for constructing a *Ramamandiram*, it must be presumed that the fund was to be utilised in equal moieties for the two purposes. Failure of one of the purposes will result in a moiety of the amount devised falling into the residue.

In *Jogeswar Narain Deo* v. *Ram Chund Dutt and others*[1] a devise under the will of a Hindu testator who had given a four-anna share of his estate to his daughter and her son for their maintenance with power of making alienation thereof by sale or gift fell to be construed. The Judicial Committee held that on a true construction of the will each took an absolute interest in a two-anna share in the estate. In dealing with the contention that there was a joint estate granted to the daughter and her son the Judicial Committee observed :

> " .... Mr. Branson * * * maintained, upon the authority of *Vydinada* v. *Nagammal*[2] that, by the terms of the will of the Rani and the appellant became, in the sense of English law, joint tenants of the 4-annas share of Silda, and not tenants in common ; and that her alienation of her share before it was severed, and without the consent of the other joint tenant, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here, and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."

That principle applies here. The fund was devised for the construction of a *Ramamandiram* at Rajavaram village and for " celebrating the marriage and other auspicious functions " of Seetharatnam. Since no part of the fund was needed for the benefit of Seetharatnam, the legacy failed *pro-tanto* and fell into the residue. Under the will Mangamma was made the owner of the residue, but by her death during the lifetime of Appanna the residuary bequest lapsed and vested as on intestacy in the plaintiff and the 24th defendant. The devise of a moiety of the fund to be applied for the construction of a *Ramamandiram* however stands good and the trust must be

1. (1896) L.R. 23 I.A. 37, 43 : 6 M.L.J. 75. 2. (1888) I.L.R. 11 Mad. 258.

carried out. Mangamma is dead, but on that account the charitable trust is not extinguished. The trial Court must give appropriate directions for utilisation of that moiety for constructing a temple according to the direction of Appanna in the will.

The testator gave to his wife Mangamma an absolute interest in the E Schedule properties, for she was invested with all powers of disposition "by way of gift, sale, etc." The will then proceeded to direct that whatever remained out of the E Schedule properties after her death shall pass to Venkataswamy and Seshagirirao. If Mangamma had survived Appanna, probably be devise in favour of Venkataswamy and Seshagirirao may have failed, but that question does not arise for consideration.

Section 105 of the Indian Succession Act, 1925, which applies to the wills of Hindus provides :

> "(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.
>
> (2) * * * * *"

Mr. Chagla for the plaintiffs contends that the estate in the E Schedule properties devised in favour of Mangamma lapsed, for, there was nothing in the will which expressly provided that in the event of Mangamma dying during the testator's lifetime, the devise in favour of Venkataswamy and Seshagirirao shall be accelerated Counsel relies upon the judgment of Wickens, V. C., in *Browne* v. *Hope*[1] and contends that a legacy does not lapse, if the testator does two things—he, in clear words, excludes lapse ; and he clearly indicates the person who is to take the legacy in case the legatee should die in his lifetime. In *Browne's case*[1] the testator gave, by his will, the residue of his estate to trustees to pay and transfer the same to seven named legatees in equal shares as tenants in common, and their respective executors, administrators and assigns and he declared that such shares shall be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married woman shall be for their separate use. It was held that the share of one of the legatees—a married woman—who died after the date of the will, but before the testator, did not belong to her husband, who was her legal personal representative, and it lapsed.

Counsel says that the rule of interpretation as enunciated by Vice-Chancellor Wickens is incorporated in section 105 of the Indian Succession Act, 1925. He submits that a legacy will not lapse only if the testator by express direction excludes lapse, and indicates clearly the person who shall take the legacy if the legatee dies during his lifetime.

We are concerned to construe the provisions of section 105 of the Indian Succession Act. That section enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. We are unable to agree that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105 (1) does not say, nor does it imply, that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency.

In *In re. Lowman Devenish* v. *Pester*[2] a testator, who under a settlement was absolutely entitled to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised that real estate by its proper description, together with certain real estate of his own, to trustees, to the use of *H*, for life, with remainder to trustees.

1. L.R. 14 Equity Cases 343.
2. L. R. (1885) 2 Ch. 348.

to preserve the contingent remainders, with remainder to the use of the first and other sons of *H* successively in tail male, with remainder to the use of the first and other sons of his niece *E* successively in tail male, with remainder to the use of the first and other sons of his niece *M* successively in tail male, with remainder to the use of the first and other sons of his niece *F* successively in tail male, with remainder over. *H* survived the testator and died a bachelor. *M* also survived the testator and died unmarried. *E* was still alive but unmarried and seventy years of age. *F* had two sons, the eldest of whom died before the testator. It was held that when there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely, although he would have take nothing if any previous legatee had survived and had taken the effect of the failure of an earlier gift is to accelerate, not to destroy, the later gift.

This rule was applied in *In re. Dunstan, Dunstan v. Dunstan*[1]. A testatrix by her will gave freeholds absolutely to *A*, subject to the bequest that whatever out of the freeholds should remain after *A*'s death shall be given to a named charity. It was held that if *A* had survived the testatrix the gift to the charity would have been repugnant and void, and *A* would have taken the freeholds absolutely. But since *A* died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to charity was accelerated and took effect.

Mangamma died during the lifetime of the testator : thereby the estate in Schedule *E* properties granted to Venkataswamy and his brother Seshagirirao was accelerated. The plaintiffs are therefore not entitled to any share in Schedule E properties.

The decree of the High Court is modified. It is declared that there is intestacy in respect of a half share in the fund arising by sale of Schedule C properties, and the plaintiff and the 24th defendant are entitled to take that half shar e in the fund. It is directed that the Trial Court till issue appropriate directions for application of the other half of the fund arising by sale of Schedule C properties for constructing *Ramamandiram* at Rajavaram village as directed by the testator in his will. Subject to this modification the appeal will be dismissed. The appellant will pay 3/4th of the costs of the contesting respondents in this Court.

V.M.K. ——— *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.C. SHAH AND G.K. MITTER, JJ.

T. G. Venkataraman etc. ... *Appellants**

v.

The State of Madras and Another etc. ... *Respondents.*

Madras General Sales Tax Act (*I of* 1959)—*Constitution of India* (1950), *Articles* 14 *and* 301—*Imposition of tax on sale of ' cane jaggery' while exempting that on ' palm jaggery'—If discriminatory and violative of equality clause of the Constitution—Freedom of trade and commerce if impeded by the levy—Legislative power if has been colourably exercised in imposing the levy.*

Since section 8 read with the Third Schedule of the Madras General Sales Tax Act (I of 1959) as amended by Madras Act II of 1968 exempts only " sugar " from liability to tax, sales of jaggery, cane and palm, now fall within the charging section. But the Government of Madras have in exercise of power under section 17 of Act I of 1959 exempted transaction of sale of " palm jaggery " from tax. It is true that between 1st April, 1958 and 31st October, 1967 transactions of sale of " cane jaggery " and " palm jaggery " were exempt from liability to pay sales

1. L. R. (1918) 2 Ch. 304.

* C.As. Nos. 281, 284, 363, 383 to 393 and 513 to 567 of 1969 — 23rd April, 17th July, 1969.

tax under the Acts of 1939 and 1959, but it cannot be inferred therefrom that the Legislature treated "palm jaggery" and "cane jaggery" as the same commodity.

The evidence on the record clearly shows that "cane jaggery" and "palm jaggery" are commercially different commodities. "Cane jaggery" is produced from the juice of sugarcane ; "palm jaggery" is produced from the juice of the palm tree. Production of "palm jaggery" in the State is small compared to "cane jaggery". The method of production of "palm jaggery" and "cane jaggery" are different ; they reach the consumers through different channels of distribution ; the prices at which they are sold differ and they are consumed by different sections of the community. It must therefore be held that "cane jaggery" and "palm jaggery" are not commodities of the same class, and in any event in imposing liability to tax on transactions of sale of "cane jaggery" and exempting "palm jaggery", no unlawful discrimination denying the guarantee of equal protection was practised.

Freedom of trade, commerce and intercourse guaranteed by Article 301 of the Constitution is protected against taxing statutes as well as other statutes, but by imposition of tax on transactions of sale of "cane jaggery" no restriction on the freedom of trade or commerce or in the course of trade with or within the State is imposed. The tax imposed on transactions of sale of "cane jaggery" does not affect the freedom of trade within the meaning of Article 301.

There is no substance in the contention that the Act which imposes tax on "cane jaggery" and the notification which exempts "palm jaggery" from liability to tax imposes a colourable exercise of authority. If the Legislature has the power to impose the tax, its authority is not open to challenge on a plea of colourable exercise of power.

Appeals from the Judgment and Order dated the 6th December, 1968 of the Madras High Court in Writ Petitions Nos. 1659 of 1968, etc.

M. S. Sethu and *A. V. V. Nair*, Advocates for Appellant (In C. As. Nos. 281 and 363 of 1969).

M. S. Sethu and *P. Parameshwara Rao*, Advocates, for Appellant (In C. A. No. 284 of 1969).

H. R. Gokhale, Senior Advocate (*K. Jayaram*, Advocate, with him), for the Appellant (In C. A. No. 383 of 1969).

K. Jayaram and *T. S. Vishwanatha Rao*, Advocates, for Appellant (In C. As. Nos. 384 to 393 and 513 to 567 of 1969.)

S. V. Gupte, Senior Advocate, (*S. Mohan* and *A. V. Rangam*, Advocates, with him), for Respondent (In C. A. No. 281 of 1969).

S. Mohan and *A. V. Rangam*, Advocates, for Respondents (In C.As. Nos. 284, 363, 383 to 393 and 513 to 567 of 1969.)

The Judgment of the Court was delivered by

Shah, J.—At the conclusion of the hearing of these appeals on 23rd April, 1969 we announced that "the appeals are dismissed with costs ; reasons in support of the order will be delivered thereafter." We proceed to record the reasons in support of the order.

The appellants carry on business as dealers in "cane jaggery" in the State of Tamil Nadu. As a result of certain legislative and executive measures, transaction of sale in "cane jaggery" were made liable as from 1st January, 1968 to tax under the Madras General Sales Tax Act, 1959, and transactions of sale in "palm jaggery" remained exempt from sales tax. The appellants filed petitions in the High Court of Madras challenging the validity of the levy of tax on "cane jaggery", on three grounds :

(1) that the levy of tax on turnover from sale of "cane jaggery" was discriminatory and violated the equality clause of the Constitution ;

(2) that the levy of tax imposes a restriction on trade and commerce contrary to the provisions of Part XIII of the Constitution ; and

(3) there is excessive delegation of legislative authority to the executive and on that account the levy of tax pursuant to an order made in exercise of the powers under section 59 of the Madras General Sales Tax Act I of 1959 on " cane jaggery " is invalid.

The High Court rejected all the contentions.

Counsel for the appellants have in these appeals urged the first two grounds and have in addition submitted that in levying tax on turnover from sale of "cane jaggery" legislative power has been colourably exercised. The argument that there was excessive delegation to the executive of the legislative power was abandoned before the Court, because the State of Madras has enacted Act II of 1968 authorising levy of tax on sale of jaggery by amending Schedule III to Madras Act I of 1959.

Turnover from sale of jaggery—cane or palm—was subject to tax under section 3 (1) of the Madras Act IX of 1939 at three pies per rupee. By G.O. No. 651 dated 28th February, 1955 and G.O. No. 2780 dated 7th September, 1955 all sales of "palm jaggery" effected through Co-operative Societies and the Palm Gur Federation were exempted from tax. By another G.O. No. 1605 dated 19th August, 1956, all transactions of sale in "palm jaggery" were exempted from sales tax with effect from 1st April, 1956. Transactions of sale in " cane jaggery " therefore continued to remain liable to tax whereas sales of " palm jaggery " enjoyed the benefit of exemption from tax.

After the judgment of this Court in *The Bengal Immunity Company Ltd.* v. *The State of Bihar and others*[1], the Parliament amended Article 286 and entry 54 in List II of the Seventh Schedule and added a new Entry 92-A in List I in the Seventh Schedule by the Constitution (Sixth Amendment) Act. In exercise of the power under Entry 92-A List I the Parliament enacted the Central Sales Tax Act 74 of 1956. By Chapter IV of that Act the power reserved under the amended Article 286, Clause (3) was exercised by the Parliament and certain classes of goods were declared to be of " Special importance in inter-State trade or commerce". By section 15 certain modifications were declared in State Acts relating to the levy of taxes on sales and purchases of declared goods. However, in the list of goods of " special importance in inter-State trade or commerce " gur or jaggery was when the Act was enacted, not included.

The Parliament then enacted the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Act 58 of 1957). Section 3 of that Act authorised the levy and collection of additional duties in respect of several classes of goods including " sugar ". By section 4 it was provided that during each financial year, there shall be paid out of the Consolidated Fund of India to the States in accordance with the provisions of the second schedule, such sums, representing a part of the net proceed of the additional duties levied and collected during that financial year, as are specified in that Schedule. It was enacted by the proviso to clause (2) of the Schedule that if during that financial year there is levied and collected in any State specified in the Table a tax on the sale or purchase of sugar by or under any law of that State, no sums shall be payable to that State under sub-clause (*ii*) or sub-clause (*iii*) of clause (*b*) in respect of that financial year, unless the Central Government by special order otherwise directs. The expression 'sugar' was defined in section 2 (*c*) as having the same meaning as it has in the First Schedule to the Central Excise and Salt Act, 1944. The Governor of Madras issued Ordinance I of 1957 directing that transactions of sale of " cane jaggery " be liable to a single point tax at 5 per cent. with effect from 1st April, 1957. By virtue of the Central Sales Tax Act, 1956, as amended by Act 31 of 1958 " sugar as defined in Item No. 8 of the First Schedule to the Central Excises and Salt Act, 1944 was declared a commodity essential to the life of the community and tax could thereafter be levied on " sugar " at the rate of 2 per cent only. But in view of the definition contained in the Central Excise and Salt Act, 1944, there was some doubt whether the expression " sugar " included *gur*. The

1. (1955) 2 S.C.R. 603 : (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168.

State of Madras being apparently of the opinion that "palm jaggery" and "cane jaggery" were subject to the provisions of the Additional Excise Act 58 of 1957, issued on 15th April, 1958, G. O. No. 1457 exempting all sales of "cane jaggery" from tax with effect from 1st April, 1958. Transactions of sale of "palm jaggery" were therefore exempt partially from sales tax from 28th February, 1955 and wholly from 1st April, 1956, and transactions of sale of "cane jaggery" were exempt from tax from 1st April, 1958.

The State Legislature enacted the Madras General Sales Tax Act I of 1959 with effect from 1st April, 1959. By section 3 every dealer whose total turnover was not less than Rs. 10,000 became liable to pay tax for each year at the rate of 2 per cent of his taxable turnover. By section 8 it was provided that subject to such restrictions and conditions as may be prescribed, a dealer who deals in goods specified in the Third Schedule shall not be liable to pay any tax under the Act in respect of such goods. Item 5 in the Third Schedule was "sugar including jaggery and gur." Section 17 of that Act authorised the State Government by notification to exempt or to make reduction in rate in respect of any tax payable under the Act on the sale or purchase of any specified goods or class of goods at all points or specified points in respect of sales by successive dealers or by any specified class of dealers in respect of the whole or any part of their turnover. By section 59 (1) of the Act the State Government was authorised by notification, to alter, add or cancel any of the Schedules.

On 1st April, 1959 transactions of sale of "sugar including jaggery and gur" were exempt from liability to pay tax under the Madras General Sales Tax Act I of 1959. The exemption applied to all transactions of sale of "cane jaggery" and "palm jaggery". On 10th September, 1965 the Government of India advised the State Government that "jaggery" was not included in the expression "sugar" in the Additional Duties of Excise Act 58 of 1957. The State of Madras in exercise of the power under sub-section (1) of section 59 of the Madras General Sales Tax Act, issued G. O. No. 2261 dated 30th December, 1967, that:

"In the said (Third) Schedule in item, 5 for the word 'including' the words but not including, shall be substituted."

The State simultaneously issued another notification that—

"In exercise of powers conferred by section 17 (1) of the Madras General Sales Tax Act, 1959, the Governor of Madras granted exemption in respect of tax payable under the Act on all sales of palm jaggery."

In consequence of the two notifications turnover from transactions of sale of "cane jaggery" which was till then exempt from tax became liable to tax under section 3 of the Madras Act I of 1959 whereas sale of "palm jaggery" remained exempt from liability to pay sales tax.

In support of the plea that the State had practised unlawful discrimination between sales of "palm jaggery" and "cane jaggery" it was urged that "cane jaggery" and "palm jaggery" which were identical commodities and were treated similarly under the successive Sales Tax Acts of the State for many years past were without any rational nexus with the object sought to be served by the Madras General Sales Tax Act, 1959, differently treated and on that account the notification issued under section 59 sub-section (1) which modifies the Third Schedule is *ultra vires*.

It may be recalled that the notification under section 59 (1) which was issued in exercise of executive authority has received legislative sanction by Madras Act 2 of 1968. Amendment in the Third Schedule now flows from the exercise of legislative authority and not executive authority.

Since section 8 read with the Third Schedule as amended by Madras Act 2 of 1968 exempts only "sugar" from liability to tax sales of jaggery, cane and palm, now fall within the charging section. But the Government of Madras have in exercise of powers under section 17 of Act I of 1959 exempted transactions of sale of "palm jaggery" from tax. It is true that between 1st April, 1958 and 31st October, 1967 transactions of sale of "cane jaggery" and "palm jaggery" were exempt from

liability to pay sales tax under the Madras General Sales Tax Acts of 1939 and 1959, but it cannot be inferred therefrom that the Legislature treated "palm jaggery" and "cane jaggery" as the "same commodity" For nearly three years before 1st April, 1958 sales of "palm jaggery" were exempt from tax but sales of "cane jaggery" were not.

The evidence on the record clearly shows that "cane jaggery" and "palm jaggery" are commercially different commodities. "Cane jaggery" is produced from the juice of sugarcane; "palm jaggery" is produced from the juice of the palm tree. Mr. Raghupathy, Deputy Secretary to the Government of Madras (Commercial Taxes) has stated in his affidavit that "palm jaggery" industry comes under the purview of Khadi and Village Industries Board and is one of the cottage industries which gives employment mainly to poor tappers. The tappers, according to Mr. Raghupathy, collect "neera" from palm and other trees and prepare jaggery by the traditional method of boiling "neera" in their huts and produce jaggery without the aid of any machinery. Production of "palm jaggery" in the State compared to "cane jaggery" is small. The price of "palm jaggery" and "cane jaggery" differ widely and apparently "palm jaggery" and "cane jaggery" are consumed by different sections of the community. It is clear that the method of production of "palm jaggery" and "cane jaggery" are different; they reach the consumers through different channels of distribution; the prices at which they are sold differ and they are consumed by different sections of the community.

In a recent judgment *N. Venugopala Ravi Varma Rajah* v. *Union of India and another*[1], this Court observed :

"............tax laws are aimed at dealing with complex problems of infinite variety necessitating adjustment of several disparate elements. The Courts accordingly admit, subject to adherence to the fundamental principles of the doctrine of equality a larger play to legislative discretion in the matter of classification. The power to classify may be exercised so as to adjust the system of taxation in all proper and reasonable ways; the Legislature may select persons, properties, transactions and objects and apply different methods and even rates for tax, if the Legislature does so reasonably.*** If the classification is rational, the Legislature is free to choose objects of taxation impose different rates, exempt classes of property from taxation, subject different classes of property to tax in different ways and adopt different modes of assessment. A taxing statute may contravene Article 14 of the Constitution if it seeks to impose on the same class of property, persons, transactions or occupations similarly situate, incidence of taxation, which leads to obvious inequality."

It was also said by the Court that :

"It is for the Legislature to determine the objects on which tax shall be levied, and the rates thereof. The Courts will not strike down an Act as denying the equal protection merely because other objects could have to been, but are not, taxed by the Legislature."

We are accordingly of the view that "cane jaggery" and "palm jaggery" are not commodities of the same class, and in any event in imposing liability to tax on transactions of sale of "cane jaggery" and exempting "palm jaggery," no unlawful discrimination denying the guarantee of equal protection was practised.

No serious argument was advanced in support of the plea that the freedom of trade and commerce guaranteed by Part XIII of the Constitution is infringed by the imposition of tax on "cane jaggery". Freedom of trade, commerce and intercourse guaranteed by Article 301 of the Constitution is protected against taxing statutes as well as other statutes, but by imposition of tax on transactions of sale of "cane jaggery" no restriction on the freedom of trade or commerce or in the course of trade with or within the State is imposed. The tax imposed on transaction of sale of "cane

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1. (1969) 2 I.T.J. 590 : (1969) 2 S.C.J. 721. S.C.J 318 : 22 S.T.C. 376 : (1969) 1 M.L.J. (S.C.)
2. (1969) 1 An. W.R. (S.C.) 28 : (1969) 1 28 : A.I.R. 1969 S.C. 147.

jaggery" does not affect the freedom of trade within the meaning of Article 301. As observed by this Court in *The State of Madras* v. *N. K. Nataraja Mudali*,[1] "a tax may in certain cases directly and immediately restrict or hamper the free flow of trade, but every imposition of tax does not do so."

There is no substance in the contention that the Act which imposes tax on "cane jaggery" and the notification which exempts "palm jaggery" from liability to tax imposes a colourable exercise of authority. If the Legislature has the power to impose the tax, its authority is not open to challenge on a plea of colourable exercise of power: *K. C. Gajapati Narayan Deo & Others* v. *The State of Orissa*[2].

There will be one hearing fee.

V.K. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, *Acting Chief Justice* V. RAMASWAMI AND A. N. GROVER, JJ.

M/s. Kurapati Venkatasatyanarayana and Brothers .. *Appellants**

v.

The State of Andhra Pradesh .. *Respondent.*

Constitution of India (1950), *Article* 286 (1) (a), *Explanation—Madras General Sales Tax Act* (*IX of* 1939), *Section* 22 (a), (i) *Explanation—Scope—When attracted.*

Sales Tax—Single order of assessment for a particular year—Part of assessment illegal —Assessment if invalid in toto.

If the goods were as a direct result of a sale delivered outside the State for the purpose of consumption in the State of first deliver, the assessee would be entitled to the exemption from sales tax by virtue of the Explanation to Article 286 (1) (*a*) of the Constitution and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

In the present case though there is a single order of assessment for the assessment year 1949-50, the assessment could be split up and dissected and the items of sale separated and taxed for different periods. It is quite easy in this case to ascertain the turnover of the appellant for the pre-Constitution and post-Constitution periods for these figures are furnished in the plaint by the appellant himself. It is open to the Supreme Court in these circumstances to sever illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void.

Appeal from the Judgment and Decree dated the 11th March, 1965 of the Andhra Pradesh High Court in A. S. Nos. 169 and 93 of 1957.

Rajeshwara Rao and *B. Parthasarathi*, Advocates, for Appellant.

D. Munikanniah, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate from the judgment of the High Court of Andhra Pradesh dated 11th March, 1965 in A.S. Nos. 93 and 169 of 1957.

The appellant was a firm of dealers in pulses at Vijayawada. It was sending pulses like green gram and black gram to other States *viz:* Bombay, Bengal, Madras and Kerala by rail in the course of their business. The consignments were addressed

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1. (1969) 1 An.W.R (S.C.) 28: (1969) 1 S.C J. A I.R. 1969 S.C. 147. 318: 22 S.T.C. 376: (1969) 1 M.L.J. (S.C.) 28:

2. (1954) S.C.R. 1 : (1953) S.C.J. 592.

* C.A. No. 1451 of 1968. 1st August, 1969.

to 'self' and the railway receipts were endorsed in favour of Banks for delivery against payments. The purchasers obtained the railway receipts after payments and took delivery of the goods. The total turnover of the business of the appellant for the year 1949-50 was Rs. 17,05,144-2-2. Of the said turnover a sum of Rs. 3,61,442-7-3 represented the turnover of sales effected outside the then Madras State. For the assessment year 1949-50 the Deputy Commercial Tax Officer collected sales-tax on the total turnover without exempting the value of the sales effected outside the State. The appellant was permitted to pay sales tax under rule 12 of the Madras General Sales Tax (Turnover and Assessment) Rules. The appellant submitted monthly returns and paid sales tax without claiming any such exemption till the end of January, 1950. But in the returns for the months of February and March, 1950 the appellant claimed exemption on sales effected outside the State. The appellant submitted a consolidated return Exhibit A-18 to the Deputy Commercial Tax Officer on 30th March 1950 claiming exemption in respect of a sum of Rs. 10,37,334-7-9 being the value of the sales effected outside the State for the period commencing from 1st April, 1949 and ending 31st January, 1950. The Deputy Commercial Tax Officer fixed the taxable turnover of the appellant at Rs. 17,05,144-2-2 and issued a notice Exhibit A-23, dated 24th October, 1950 to show cause why the appellant should not be assessed accordingly. The appellant was thereafter held liable to pay tax amounting to Rs. 26,642-14-0 on a net turnover of Rs. 17,05,144-2-2. The appellant preferred an appeal to the Commercial Tax Officer and a revision petition to the Board of Revenue, Madras but was unsuccessful. The appellant, therefore brought a suit for the recovery of Rs. 21,270-13-0 being the amount of tax illegally collected from him together with interest, contending that the sales effected outside the State could not be taxed under Article 286 (1) (*a*) of the Constitution of India. The State of Madras contested the suit on the ground that the sales were taxable as they fell within the purview of explanation 2 to section 2 (*h*) of the Madras General Sales Tax Act, 1939 (hereinafter referred to as the Act). The Subordinate Judge held that for the period from 1st April, 1949 to 25th January 1950 the appellant was not entitled to impeach the assessment on the turnover relating to sales outside the State. As regards the period from 26th March, 1950 to 31st March 1950, the Subordinate Judge took the view that the part of the turnover relating to outside sales was not liable to sales-tax but as there was a single order of assessment for the entire period the entire assessment was illegal. Against the judgment of the Subordinate Judge both the appellant and the respondent filed appeals A.S. No. 93 of 1957 and A.S. No. 169 of 1957 to the High Court of Andhra Pradesh. By its order dated 18th April, 1960 in Appeal No. 169 of 1957 the High Court called for a finding from the trial Court as to whether the appellant was able to prove the facts entitling him to invoke the explanation to Article 286 (1) (*a*). By its order dated 21st July, 1962 the trial Court submitted a finding to the effect that in view of the decision of the Supreme Court in *India Copper Corporation Ltd.* v. *The State of Bihar*[1], the burden of proof was not on the appellant and that the finding will have to be given in its favour. But by its order dated 5th March, 1963 the High Court directed the Subordinate Judge to record a finding after considering the evidence adduced by the appellant as to whether the goods in question were delivered for consumption within the delivery States. In its order dated 22nd March, 1963, the trial Court, after considering the evidence given by the appellant's witnesses came to the conclusion that the deliveries were not made for by a common judgment dated 11th March, 1965 in A.S. Nos. 93 and 169 of 1957 held that the appellant could not claim the benefit under Article 286 (1) (*a*) of the Constitution in the absence of evidence as to how the wholesalers disposed of the goods after obtaining delivery and therefore the entire turnover for the year 1949-50 would be assessable to tax. In the result A.S. No. 169 of 1957 filed by the respondent was allowed and A.S. No. 93 of 1957 filed by the appellant was dismissed.

The Madras General Sales Tax Act, 1939 was enacted in exercise of the legislative authority conferred upon the Provincial Legislatures by Entry 48 of List II read with section 100 (3) of the Government of India Act, 1935. The explanation to section 2 (*h*) of this Act is as follows :

1. (1961) 1 S.C.J. 457 : (1961) 2 S.C.R. 276 : (1961) 12 S.T.C. 56.

"Notwithstanding anything to the contrary in the Indian Sale of Goods Act 1930 the sale or purchase of any goods shall be deemed, for the purpose of this Act to have taken place in this Province, wherever the contract of sale or purchase might have been made.

(*a*) If the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made or,

(*b*) in case the contract was for the sale or purchse of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made."

Under Entry 48 of List II of the Government of India Act, 1935 the Provincial Legislatures could tax sales by selecting some fact or circumstance which provided a territorial nexus with the taxing power of the State even if the property in the goods sold passed outside the Province or the delivery under the contract of sale took place outside the Province. Legislation taxing sales depending solely upon the existence of a nexus, such as production or manufacture of the goods, or presence of the goods in the Province at the date of the contract of sale, between the sale and the legislating Province could competently be enacted under the Government of India Act, 1935. [See *Tata Iron and Steel Co. Ltd.* v. *The State of Bihar*[1] and *Poppatlal Shah* v. *The State of Madras*[2]].

By Article 286 of the Constitution certain fetters were placed upon the legislative of powers of the States as follows:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State ; or

(*b*) in the course of the import of the goods, into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter State trade or commerce :

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

Therefore, by incorporating section 22 of the Madras Act read with Article 286, notwithstanding the amplitude of the power otherwise granted by the charging section read with the definition of 'sale', a cumulative fetter of triple dimension was imposed upon the taxing power of the State. The Legislature of the Madras State could not since 26th January, 1950, levy a tax on sale of goods taking place outside the

1. (1958) S.C.J. 818 : (1958) S.C.R. 1355. (1953) 1 M.L.J. 739.
2. (1953) S.C.R. 677 : (1953) S.C.J. 369 :

State or in the course of import of the goods, into, or export of the goods out of, the territory of India, or on sale of any goods where such sale took place in the course of inter State trade or commerce. By the Explanation to Article 286 (1) (*a*) which is incorporated by section 22 of the Madras Act a sale is deemed to take place in the State in which the goods are actually delivered as a direct result of such sale for the purpose of consumption in that State even though under the law relating to sale of goods the property in the goods has by reason of such sale passed in another State. In the *State of Bombay and another* v. *The United Motors (India) Ltd.*[1], it was held that since the enactment of Article 286 (1)(*a*) a sale described in the Explanation which may for convenience be called an "Explanation sale" is taxable by that State alone in which the goods sold are actually delivered as a direct result of sale for the purpose of consumption in that State.

With a view to impose restrictions on the taxing power of the States under the pre-Constitution statutes, amendments were made in those statutes by the Adaptation of Laws Order. As regards the Madras Act the President issued on 2nd July, 1952 the Fourth Amendment inserting a new section, section 22 in that Act. It runs as follows :

"Nothing contained in this Act shall be deemed to impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place—

(*a*) (i) outside the State of Madras, or

(ii) in the course of import of the goods into the territory of India or of the export of the goods out of such territory, or

(*b*) except in so far as Parliament may by law otherwise provide, after the 31st March, 1951, in the course of inter-State trade or commerce, and the provisions of this Act shall be read and construed accordingly.

Explanation.—For the purposes of clause (*a*) (i) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State."

By this amendment the same restrictions were engrafted on the pre-Constitution statute as were imposed by Article 286 of the Constitution upon post-Constitution statutes.

As regards the sales for the period from April, 1949 to 25th January, 1950, it was admitted before the Deputy Commercial Tax Officer that the goods were actually in the Madras State at the time the contract of sale was concluded. It was for this reason that the Deputy Commercial Tax Officer negatived the claim which the appellant made in respect of those sales. It appears that in the trial Court the appellant challenged the constitutional validity of explanation to section 2 (*h*) of the Act. But in view of the decision of this Court in the *Tata Iron & Steal Co's case*[2], and *Poppatlal Shah's case*[3], Counsel on behalf of the appellant did not seriously dispute the validity of the assessment in regard to sales from 1st April, 1949 to 25th January, 1950.

With regard to the period from 26th January, 1950 to 31st March, 1950 the contention of the appellant is that the High Court was in error in holding that the burden of proof was on the appellant to show that there was not only delivery of goods for consumption within the delivery States but there was actual consumption of the goods in those States. In our opinion the argument is well-founded and must be accepted as correct. In *India Copper Corporation's case*[4], it was pointed out by this Court that if the goods were as a direct result of a sale delivered outside the State of Bihar

1. (1953) S.C.R. 1069: (1953) S.C.J. 373: (1953) 1 M.L.J. 739. (1953) 1 M.L.J. 743.
2. (1958) S.C.J. 818: (1958) S.C.R. 1355.
3. (1953) S.C.J. 369 : (1953) S.C.R. 677 :
4. (1961) 1 S.C.J. 457: (1961) 2 S.C.J. 276: (1961) 12 S.T.C. 56.

for the purpose of consumption in the State of first delivery, the assessee would be entitled to the exemption from sales-tax by virtue of the Explanation to Article 286 (1) (*a*) of the Constitution and it would not be necessary for the assessee to prove further that the goods so delivered were actually consumed in the State of first destination.

In the present case the Subordinate Judge has, upon a consideration of the evidence adduced by the parties stated in his report dated 27th January, 1962 that the intention of the appellant was that the sale and delivery should be for the purpose of consumption in the delivery States. It is true that in his subsequent report dated 22nd March, 1963 the Subordinate Judge gave a different finding. But it is obvious that the subsequent report of the Subordinate Judge is vitiated because the principle laid down by this court in *India Copper Corporation's case*[1], has not been taken into account. Having regard to the evidence adduced by the appellant in this case we are satisfied that the part of the turnover which related to sales from 26th January, 1950 to 31st March, 1950 was not liable to sales-tax and the levy of sales-tax from appellant to this extent is illegal.

The next question arising in this appeal is whether the assessment order of the Deputy Commercial Tax Officer for the year 1949-50 is illegal in its entirety notwithstanding the fact that the State Government had a right to levy sales-tax on outside sales which were effected prior to 26th January, 1950. It was argued for the appellant that the assessment must be treated as one and indivisible and if a part of the assessment is illegal the entire assessment must be deemed to be infected and treated as invalid. In support of this argument reference was made to the decision of this Court in *Ram Narain Sons Ltd.* v. *Assistant Commissioner of Sales Tax*[2] in which this Court observed as follows :

> " The necessity for doing so is, however, obviated by reason of the fact that the assessment is one composite whole relating to the pre-Constitution as well as the post-Constitution periods and is invalid in toto. There is authority for the proposition that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation renders the assessment invalid in toto."

The Court cited with approval a passage from the judgment of the Judicial Committee in *Bennett & White (Calgary) Ltd. and Municipal District of Sugar City No. 5.*[3]

> " When an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a Court can sever the items, and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not dismissible as '*de minimis*') is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly. That matter is covered by authority. In *Montreal Light, Heat & Power Consolidated* v. *City of Westmount*[4] the Court (see especially per Anglin, C.J.) in these conditions held that an assessment which was bad in part was infected throughout, and treated it as invalid. Here their Lordships are of opinion, by parity of reasoning, that the assessment was invalid in toto."

Applying the principle to the special facts and circumstances of the case the Court set aside the orders of assessment and directed that the case should be remanded to the Assessment Officer for re-assessment of the appellants in accordance with law. The same principle was applied but with a different result in the later case the *State of Jammu and Kashmir* v. *Caltex (India) Ltd.*[5] in which the question arose as regards the validity of an assessment of sales-tax of retail sales of motor spirit. The Petrol

1. (1961) 1 S.C.J. 457: (1951) 2 S.C.R. 276: (1961) 12 S.T.C. 56
2. (1955) 2 M.L.J. (S.C.) 302 : (1955) S.C.J. 808 at P. 815 : (1955) 2 S.C.R. 483 : (1955) 6 S.T.C. 627 at 637.
3. (1961) A.C. 786 at p. 816.
4. (1926) S.C.R. (can) 515
5. (1966) 2 S.C.J. 755 : (1966) 3 S.C.R. 149: (1966) 17 S.T.C. 612.

Taxation Officer assessed the respondent to pay sales-tax for the period January, 1955 to May, 1959 under section 3 of the Jammu & Kashmir Motor Spirit (Taxation of Sales) Act, 2005. The respondent applied under section 103 of the Constitution of Jammu and Kashmir and a single Judge of the High Court held that the respondent was liable to pay sales-tax only in respect of the sales which took place during the period January to September, 1955 and issued a writ restraining the appellants from levying tax for the period October, 1955 to May, 1959. On appeal a Division Bench of the High Court quashed the assessment for the entire period. On appeal to this Court it was held that though there was one order of assessment for the period 1st January, 1955 to May 1959 the assessment could be split up and dissected and the items of sale could be separated and taxed for different periods. It was pointed out that the sales-tax was imposed in the ultimate analysis on receipts from individual sales or purchases of goods effected during the entire period, and, therefore, a writ of *mandamus* could be issued directing the appellant not to realise sales-tax with regard to transactions of sale during the period from 7th September, 1955 to May 1959.

A similar question arose for determination in an American case [*Frank Ratterman* v. *Western Union Telegraph Co.*[1]]. The question in that case was "whether a single tax, assessed under the Revised Statutes of Ohio, section 2778 upon the receipts of a telegraph company which receipts were derived partly from interstate commerce and partly from commerce within the State but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that the said receipts were derived from interstate commerce." It was held unanimously by the Supreme Court of the United States that the assessment was not wholly invalid but it was invalid only in proportion to the extent that such receipts were derived from interstate commerce. It was observed that where the subjects of taxation can be separated so that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the Court will act upon this distinction, and will restrain the tax on interstate commerce, while permitting the State to collect that upon commerce wholly within its own territory. The principle of this case has been consistently followed in American cases : (*see Bowman* v. *Continental Company*[2]. This case has been cited with approval by this Court in *The State of Bombay* v. *The United Motors (India) Ltd.*[3], wherein it was observed that the same principle should be applied in dealing with taxing statutes in this country also.

In the present case we are of opinion that though there is a single order of assessment for the period from 1st April, 1949 to 31st March, 1950 the assessment could be split up and dissected and the items of sale separated and taxed for different periods. It is quite easy in this case to ascertain the turnover of the appellant for the pre-Constitution and post-Constitution periods for these figures are furnished in the plaint by the appellant himself. It is open to the Court in these circumstances to sever the illegal part of the assessment and give a declaration with regard to that part alone instead of declaring the entire assessment void. For these reasons we hold that the appellant should be granted a declaration that the order of assessment made by the Deputy Commercial Tax Officer for the year 1949-50 is invalid to the extent that the levy of sales-tax is made on sales relating to goods which were delivered for the purpose of consumption outside the State for the period from 26th January, 1950 to 31st March, 1950. The result is that the appellant is entitled for refund of the amount illegally collected from him for the period from 26th January, 1950 to 31st March, 1950. The trial Court has already found that the appellant is entitled to claim exemption with regard to turnover for this period to the extent of Rs. 3,34,107-15-6 and the tax payable on this sum is Rs. 5,220-7-0. The appellant is therefore, entitled to a decree for the refund of Rs. 5,220-7-0. The appellant is also entitled to interest at 6 per cent. per annum from the date of suit till realisation of this amount.

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1. 127 H.S. 411.
2. 250 H.S. 642.
3. (1953) S.C.R. 1069 at 1097 : (1953) S.C.J. 373 : (1953) 1 M.L.J. 743.

For these reasons we allow this appeal and set aside the judgment of the Andhra Pradesh High Court dated 11th March, 1965 in A.S. Nos. 93 and 169 of 1957 and allow this appeal to the extent indicated above.

There will be no order with regard to costs.

V.K.

Appeal allowed in part.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, *Acting Chief Justice*, MR. JUSTICE V. RAMASWAMI AND MR. JUSTICE A. N. GROVER.

V. Jaganmohan Rao and others ... *Appellants**

v.

Commissioner of Income-tax and Excess Profits Tax, Hyderabad ... *Respondent.*

Income-tax Act (XI of 1922), section 34 (1) (b) and 10—Back assessment—Information—Judicial decisions—Part of assessable income—Failure to tax—Escapement—Purchase by assessee of properties from Hindu father—Character of property—Self-acquired in joint family property—Litigation between father and sons—Pendency of appeal at the time of purchase by assessee—Decision by Privy Council—Information—Payment by assessee to sons to get their interest released—Capital expenditure.

The assessee purchased a mill from a Hindu father on the basis that it was his self-acquired property. On the date of the purchase, the question whether the property was the self-acquired property of the father or the joint family propery was the subject-matter of an appeal pending in the High Court. The High Court in the appeal held that the mill was the joint family property. The father appealed to the Privy Council. Pending that appeal, the assessee was submitting returns for the relevant assessment years. Before the assessments were taken up, the assessee entered into a compromise with the sons of the vendor and got a release of their interest in the property on payment of Rs. 1,15,000. The assessee as the Receiver appointed by the High Court was depositing the income from the property in the High Court. The Privy Council decided the appeal in favour of the father. On the basis of the decision of the Privy Council, the Income-tax Officer, commenced back assessment proceedings in respect of the lease income of the mills. The Tribunal upholding the orders of the Department held that the decision of the Privy Council constituted information for the back assessment and that the sum paid by the assessee for obtaining the sons' interest in the property released was a capital expenditure and hence not allowable.

The High Court in reference held that on the basis of the compromise between the assessee and the sons part of the amount was taken to be for acquisition of the capital asset and part towards the discharge of the claim towards the profits and hence the amount should be apportioned. The Revenue as well as the assessee appealed :

Held, that the back assessment proceedings are validly taken as the decision of the Privy Council constituted the information. The payment of Rs. 1,15,000 is a capital expenditure made by the assessee to perfect his title to a capital asset and the assessee is not entitled to set-off any portion of the amount as attributable to the lease money.

Once an assessment is reopened by issuing a notice under the Act the previous under assessment is set aside and the whole assessment proceedings start afresh.

The word "information" in section 34 (1) (*b*) included information as to the true and correct state of the law and so would cover information as to relevant judicial

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* C.As. Nos. 893 to 898 and 1381 to 1386 of 1966. 31st July, 1969.

decisions. Escapement under section 34 (1) (*b*) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. But even in a case where a return had been submitted an Income-tax Officer had erroneously failed to tax a part of the assessable income it was a case where that part of the income had escaped assessment.

Held on facts: the assessee deliberately suppressed the fact that there was a compromise between himself and sons under which he was entitled to the whole of the income from the mill. The decision of the Privy Council would constitute information for the purposes of back assessment proceedings.

The contention that the Officer could have legitimately assessed a third share of the income which was due to the assessee according to the judgment of the High Court and there was escapement only to the extent of two-third share income is not of much avail to the assessee because once proceedings under section 34 are taken to be validly initiated with regard to the two-third share of the income, the jurisdiction of the Officer cannot be confined only to that portion of the income.

Also held: it is well established that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. If the asset which is acquired is in its character a capital asset, then any sum paid to acquire it must surely be capital outlay. Money paid in consideration of the acquisition of a source of property or income is capital expenditure.

Held on facts: it cannot be said that the amount was paid partly for the acquisition of the capital asset and partly to discharge the claim towards profits. The fact that the High Court took into consideration the income from the mill in testing whether the offer made by the assessee for the release of the claim of the sons was a fair offer would not mean that the sons were given as a result of the compromise a share in the profits of the assessee. It was a lumpsum payment for acquisition of the capital asset and the claim of the sons for the lease money from the property was merely ancillary or incidental to the claim to the capital asset. The High Court was in error in holding that the amount should be apportioned between capital and income. The entire amount should be treated as capital payment and the assessee is not entitled to exclude from the income sought to be assessed in his hands any portion of that amount.

Appeals from the Judgment and Order dated the 7th December, 1962, of the Andhra Pradesh High Court in Case Referred No. 24 of 1956.

D. Narasaraju, Senior Advocate (*P. Ramarao*, *K. R. Chaudhuri* and *K. Rajendra Chaudhuri*, Advocates, with him), for Appellants (In C. As. Nos. 893 to 898 of 1966) and the Respondents (in C. As. Nos. 1381 to 1386 of 1966).

Jagdish Swarup, Solicitor-General of India (*S. K. Aiyar* and *R. N. Sachthey* Advocates, with him), for Respondent (In C. As. Nos. 893 to 898 of 1966) and the Appellants (in C. As. Nos. 1381 to 1386 of 1966).

The Judgment of the Court was delivered by

Ramaswami, J.—The assessee who is the kartha of a Hindu undivided family was assessed in that status for the relevant assessment years, 1944-45, 1945-46, 1946-47 not only to income-tax but also to excess profits tax. On 1st February, 1941, he purchased from Randhi Appalaswamy (hereinafter referred to as the vendor) a spinning mill known as Sri Satynarayana Spinning Mills, Rajahmundry, for a sum of Rs. 54,731. The purchase was made at a period when there was litigation between the sons of the vendor and the vendor in respect of the spinning mill and other properties. The sons had filed a suit against the father, the vendor, claiming the schedule properties including the mill as joint family properties and for partition of the same. The vendor claimed that the properties were his self-acquired properties. The District Judge, Rajahmundry, held that the properties were the self-acquired properties of the vendor and dismissed the suit of the plaintiff. Against the judgment of the District

Judge an appeal was filed in the Madras High Court, being A.S. No. 175 of 1938. While the appeal was pending, on 1st February, 1941 the assessee purchased the mill from the vendor who purported to sell the same as the sole owner. In A.S. No. 175 of 1938 the Madras High Court held that the properties of the vendor were not his self-acquired properties but were joint family properties in which the plaintiffs had a two-thirds share. Against this judgment the vendor preferred an appeal to the Privy Council. While that appeal was pending the assessee had submitted returns for the relevant assessment years. However, before the assessments were taken up the assessee entered into a compromise with the plaintiffs on 7th September, 1945, by virtue of which he got a release of the interest of the vendor's sons on payment of Rs. 1,15,000. While the appeal was pending before the Privy Council the plaintiffs had applied to the High Court for recovery of their share of the profits. The High Court appointed the assessee as the Receiver directing him to deposit the profits in the High Court. The assessee deposited a sum of Rs. 1,09,613 for the year 1944-45, Rs. 31,087 for the year 1945-46 and Rs. 4,775 for the year 1946-47. Under the compromise the assessee was entitled to withdraw these amounts on payment of Rs. 1,15,000. The Privy Council decided the appeal on 2nd July, 1947, reversing the order of the High Court and restoring that of the District Judge holding that Appalaswamy was the absolute owner of the mill and the sons had no right, title or interest therein. On receipt of the Privy Council's decision which finally determined the rights of the parties and the ownership of the assessee in the mill, the Income-tax Officer issued on 2nd March, 1948 a notice under section 34 of the Income-tax Act in respect of Rs. 1,09,613 received by the assessee as lease income of the mill. It was contended for the assessee (1) that the proceedings initiated under section 34 of the Act for the year 1944-45 assessment were invalid in law as there was no new information leading to the discovery that income had escaped assessment, (2) that in any event the assessee was entitled to set off the sum of Rs. 1,15,000 paid to the sons of Appalaswamy under the compromise approved by the High Court for releasing their rights, if any, in the mill against the assessee's income from the mill. The Income-tax Officer rejected these contentions and treated the whole amount of Rs. 1,15,000 as paid toward capital expenditure in acquiring an asset. The Appellate Assistant Commissioner rejected the appeal of the assessee. The Tribunal affirmed the order of the Appellate Assistant Commissioner. It held in the first place that the assessee had not disclosed the impugned source of income from the mill in his original assessment, that the matter as to the assessee's ownership of the mill was *sub-judice* and that the decision of the Privy Council constituted information not only of law but also as to the factum of the ownership of the mill and the income therefrom. The Tribunal expressed the view that the sum of Rs. 1,15,000 could not be allowed to be set off against the assessee's income from the mill as it was an *ex gratia* payment to the sons of Appalaswamy who had no right, title or interest in the mill and it was paid in order to perfect a supposed defective title and as such was of capital nature. Thereafter the Income-tax Appellate Tribunal stated a case to the High Court under section 66 (2) of the Indian Income-tax Act, 1922 on the following questions of law;

"R.A. No. 779 which relates to the assessment year 1944-45 :

(1) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1944-45, the assessment made on the assessee in the status of a Hindu undivided family in respect of income received by him as Receiver could be justified notwithstanding the provisions of section 41 of the Act?

(2) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 1,09 613 in the hands of the assessee is valid in the face of the compromise memo. dated 7th September, 1945 approved by the Court ?

(3) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs 1,15,000 being the amount paid to the minors for releasing their rights in the property from out of the amount received from the mill ?

R.A. No. 780 which relates to assessment year 1945-46 :

(1) Whether, on the facts and in the circumstances of the case, the assessment made under section 34 of the Act is valid in law ?

(2) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1945-46, the assessment on the assessee in the status of a Hindu undivided family in respect

of the income received by him as Receiver could be justified notwithstanding the provisions of section 41 of the Act ?

(3) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs 31,087 in the hands of the assessee is valid in the face of the compromise memo dated 7th September, 1945 approved by the Court ?

(4) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs 1,15,000 being the amount paid to the minors for releasing their rights in the property from out of the amount received from the mill ?

R.A. No. 781 which relates to assessment year 1946-47 :

(1) Whether, on the facts and in the circumstances of the case, in respect of the assessment year 1946-47 the assessment on the assessee in the status of a Hindu undivided family in respect of income received by him as Receiver could be justified, notwithstanding the provisions of section 41 of the Act ?

(2) Whether, on the facts and in the circumstances of the case, the assessment of the entire income of Rs. 4,775 in the hands of the assessee is valid in the face of the compromise memo. dated 7th September, 1945 approved by the Court?

(3) Whether, on the facts and in the circumstances of the case, the assessee is not entitled to set off Rs. 1,15,000 being the amount paid to the minors for releasing their right in the property from out of the amount received from the mill ? "

The Appellate Tribunal pointed out in the statement of the case that question No. 1 in R.A. No. 780 for the assessment year 1945-46 pertained to the earlier assessment year 1944-45 in R.A. No. 779 and also that question No. 2 in R.A. No. 780 and R.A. No. 779 for the assessment year 1945-46 and the corresponding excess profits tax assessment did not arise in that year but pertained to the earlier assessment year 1944-45 in R.A. No. 779 and the corresponding excess profits tax assessment in R.A. No. 782.

The High Court answered question Nos. 1 and 2 in R.A. No. 779 and question No. 1 in R.A. No. 780 in the affirmative. The High Court held that re-assessment proceedings have been validly initiated under section 34 of the Act. The High Court found that the assessment on the assessee in the status of Hindu undivided family in respect of income received by him as Receiver was proper. The High Court thought that the basis of the compromise in the Madras High Court entered into between the assessee and the minor sons of the vendor Appalaswamy wherein the assessee paid Rs. 1,15,000 to the minor sons cannot be ignored. The High Court negatived the contention of the Income-tax Department that the sum of Rs. 1,15,000 was paid to cure a supposed defect in the title and that it was a capital payment. Upon the interpretation of the terms of the compromise the High Court took the view that the amount of Rs. 1,15,000 was paid partly towards acquisition of capital asset and partly towards the discharge of the claim towards profits and hence it should be apportioned towards capital and income in the proportion of 90/85. C.As. Nos. 1331 to 1386 of 1966 are brought by certificate from the judgment of the High Court on behalf of the Commissioner of Income-tax and C.A. Nos. 893 to 898 of 1966 were brought by special leave from the same judgment to this Court on behalf of the assessee.

After the Amending Act of 1939 and before the Amending Act of 1948 section 34 stood as follows :

" (1) If in consequence of definite information which has come into his possession the Income-tax Officer, discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income profits or gains or in the case of a company on the principal officer thereof a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profit or gains, and the provisions of this Act, shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

* * * *

(2) No order of assessment under section 23 or of assessment or re-assessment under sub-section (1) of this section shall be made after the expiry, in any case to which clause (c) of sub-section

(1) of section 23 applies, of eight years, and in any other case, of four years from the end of the year, in which the income, profits or gains were first assessable.

* * * *".

The first question arising in this case is whether the proceeding under section 34 is legally valid. It was contended by Mr. Narasaraju that the decision of the Privy Council could not be said to be definite information within the meaning of the section. It was said that the Income-tax Officer was fully aware of the circumstances of the case and the assessee had placed all the relevant facts before him, namely, that under the High Court's judgment the vendor was only entitled to one-third share of the income pending the decision of the appeal before the Privy Council. In our opinion there is no justification for this argument. It is not true to say that the assessee brought all the relevant facts before the Income-tax Officer. On the contrary he deliberately suppressed the fact that there was a compromise between himself and the plaintiffs under which he was entitled to the whole of the income from the mill. At any rate the Privy Council's decision which determined the rights of the parties irrespective of the compromise did constitute definite information within the meaning of section 34 of the Income-tax Act. This view is borne out by the decision of this Court in *Maharaja Kumar Kamal Singh* v. *Commissioner of Income-tax*[1]. In that case the Income-tax Officer had, following the decision of the High Court in *Kamakhya Narain Singh's case*[2], omitted to bring to assessment for the year 1945-46 the sum of Rs. 93,604 representing interest on arrears of rent due to the assessee in respect of agricultural land on the ground that the amount was agricultural income. Subsequently the Privy Council, on appeal from that decision held that interest on arrears of rent payable in respect of agricultural land was not agricultural income. As a result of this decision the Income-tax Officer initiated re-assessment proceedings under section 34 (1) (*b*) of the Income-tax Act and brought the amount of Rs. 93,604 to tax. In these circumstances it was held by this Court firstly that the word "information" in section 34 (1)(*b*) included information as to the true and correct state of the law, and so would cover information as to relevant judicial decisions, secondly, that "escape" in section 34 (1) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. But even in a case where a return had been submitted, if the Income-tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment. The decision of the Privy Council, therefore, was held to be information within the meaning of section 34 (1) (*b*) and the proceedings for re-assessment were validly initiated. In our opinion the principle of this decision governs the present case and it must be held that the proceedings initiated under section 34 for the assessment year 1944-45 were legally valid. It was stated on behalf of the appellant that in any case the Income-tax Officer could have legitimately assessed one-third share of the income which was due to the assessee according to the judgment of the Madras High Court and there was escape only to the extent of two-third share of the income. This argument is not of much avail to the appellant because once proceedings under section 34 are taken to be validly initiated with regard to two-third share of the income, the jurisdiction of the Income-tax Officer cannot be confined only to that portion of the income. Section 34 in terms states that once the Income-tax Officer decides to reopen the assessment he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under section 22 (2) and may proceed to assess or re-assess such income, profits or gains. It is, therefore, manifest that once assessment is reopened by issuing a notice under sub-section (2) of section 22 the previous under-assessment is set aside and the whole assessment proceedings start afresh. When once valid proceedings are started under section 34 (1) (*b*) the Income-tax Officer had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.

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1. (1959) 35 I.T.R. 1 : (1959) 1 M.L.J. (S.C.) 92 : (1959) 1 An.W.R. (S.C.) 92 : (1959) 1 S.C.R. (Supp.) 10 : (1959) S.C.J. 230 : A.I.R. 1959 S.C. 257.
2. (1946) 14 I.T.R. 673 : A.I.R. 1947 Pat. 115.

The second question involved in this case is whether the High Court was right in holding that any portion of the amount of Rs. 1,15,000 was liable to be treated as business expenditure. It is well established that where money is paid to perfect a title or as consideration for getting rid of a defect in the title or a threat of litigation the payment would be capital payment and not revenue payment. What is essential to be seen is whether the amount of Rs. 1,15,000 was paid for bringing into existence a right or asset of an enduring nature. In other words if the asset which is acquired is in its character a capital asset, then any sum paid to acquire it must surely be capital outlay. Money paid in consideration or the acquisition of a source of profit of income is capital expenditure both on principle and authority. In *Atherton* v. *British Insulated and Helsby Cables Ltd.*[1] Viscount Cave said :

" But where an expenditure is made, not only once for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as property attributable not to revenue but to capital."

In *Commissioner of Taxes* v. *Nchanga Consolidated Copper Mines Ltd.*[2], Lord Radcliffe observed at p. 960 :

" Courts have stressed the importance of observing a demarcation between the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income-earning operations Probably this is as illuminating a line of distinction as the law by itself is likely to achieve."

It is, however, contended on behalf of the assessee that the amount of Rs. 1,15,000 was paid partly for the acquisition of capital asset and partly to discharge the claim towards profits and hence there should be an apportionment of the amount. It is not possible to accept this contention. It appears from the order of the High Court that the value of the mill was fixed at Rs. 1,15,000 after taking into consideration the fact that the mill was built on a leasehold premises. The value of the machinery was fixed at Rs. 1,36,000 and the leasehold interest was fixed at Rs. 14,000. On this basis the share of the minors was taken to be Rs. 90,000. In respect of the profits the claim of the plaintiffs was taken to be Rs. 85,000. The total claim was therefore Rs. 1,75,000 so that the offer of Rs. 1,15,000 for the release of the claim of the plaintiffs in the mill was held to be fair. The High Court, therefore, certified the compromise to be for the benefit of the minor plaintiffs. In the course of its order dated 7th September, 1945 the High Court observed :

"There are, however, numerous risks which the continuance of the litigation would necessarily involve. The Privy Council might hold that the mill was the self-acquired property of the father, in which case the plaintiffs would get nothing and would incur a liability for costs. It might also be held that, though the property was the family property, the father was entitled as the natural guardian to sell the interests of minor sons in discharging of a binding family obligation There is the further possibility that by the time the litigation ends the property will have deteriorated and its value will have been materially reduced by the termination of the lease of the land.

Taking all these contingencies into consideration we are of opinion that the offer made by the purchaser of Rs. 1,15,000 for the release of the claim, if any, of the two sons in the mill sold to him by their father is a fair offer, the acceptance of which would be beneficial to the minor second plaintiff "

It is true that the High Court took into consideration the income from the mill in testing whether the offer made by the purchaser of Rs. 1,15,000 for the release of the claim of the plaintiffs was a fair offer. But that does not mean that the sons of Appalaswamy were given as a result of the compromise a share in the profits of the assessee. It is clear from the circumstances of this case that the payment of Rs. 1,15,000 was made by the assessee in order to perfect his title to capital asset and the assessee is not entitled to set off any portion of the amount as attributable to the lease money. It was a lump sum payment for acquisition of a capital asset and the claim of the plaintiffs for the lease money from the property was merely ancillary or incidental to the claim to the capital asset. In our opinion the High Court was in error in holding that the amount should be apportioned between capital and income. In

1 (1926) A C 205, 213 : 10 T. C. 155 ; 95 L.J. K B. 336 : 42 T L R 187.

2. (1964) A. C. 948 : (1964) 2 W L R. 339 (1964) 1 All E R. 208.

the result so far as questions 3 and 4 in R.A. No. 779, questions 1 and 2 in R.A. No. 780 and questions 2 and 3 in R.A. No. 781 are concerned the answer is that the entire amount of Rs. 1,15,000 should be treated as capital payment and the assessee is not entitled to exclude from the income sought to be assessed in his hands any portion of that amount.

We accordingly allow C.A. Nos. 1381 to 1386 of 1966 to the extent indicated above. C.A. Nos. 893 to 898 of 1966 are dismissed. There will be no order as to costs in either of two sets of appeals.

V.S. ——— *Ordered accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, *Chief Justice*, MR. JUSTICE J. C. SHAH, MR. JUSTICE V. RAMASWAMI, MR. JUSTICE G. K. MITTER AND MR. JUSTICE A.N. GROVER.

The Assistant Commissioner of Urban Land Tax, Madras and others etc. .. *Appellants**

v.

The Buckingham and Carnatic Co., Ltd., etc. .. *Respondents.*

Madras Urban Land Tax Act (XII of 1966), *section* 6 *and Constitution of India* (1950), *Articles* 14 *and* 19 (1) (f), *Schedule VII, List I, Entry* 86 *and Schedule VII, List II, Entry* 49—*Validity of the Act—Whether* ultra vires *of Articles* 14 *and* 19 (1) *Constitution of India—Act whether falls under Schedule VII, List I, Entry* 86 *or Schedule VII, List II, Entry* 49—*Legislative entries to be given liberal interpretation—No overlapping—Retrospective operation of laws—Whether unreasonable.*

There is no warrant for the assumption that Entries 86, 88 of List I and Entry 48 of List II form a special group embodying any particular scheme. The directive principle embodied in Article 39 (*c*) applies both to Parliament and to the State Legislature and it is difficult to conceive how Entries 86 to 88 of List I would exclude any power of the State Legislature to implement the same principle. The Legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subject to the list is not by way of scientific or logical definition but by way of a mere *simplex enumeratio* of broad categories. There is no reason for holding that Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II. There is no conflict between entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under the Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of total assets of the

*C.As. Nos. 21 to 23, 46, 47, 125 and 574 of 1969. 11th April, 1969.

assessee. But Entry 49 of List II contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee by legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49 List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject-matter. In pith and substance the new Act in imposing a tax on urban land at a percentage of the market value is entirely within the ambit of Entry 49 of List II and within the competence of the State Legislative and does not in any way trench upon the field of legislation of Entry 86 of List I.

The legislative histroy of Entry 49, List II does not lend support to the argument that Entry 49, of List II relating to tax on lands and buildings cannot be separated. Entry 49 " Taxes on lands and buildings " should be construed as taxes on lands and taxes on buildings and there is no reason for restricting the amplitude of the language used in the Entry. Having regard to the language and context of section 6 of the new Act the opinion which the Assistant Commissioner has to form under that section is not subjective but should be reached objectively upon the relevant evidence after following the requisite formalities laid down in sections 7 to 11. After considering the relevant sections, it was held that the Act envisages a detailed procedure regarding submission of returns the making of an assessment after hearing objections and a right of appeal to higher authorities and that provisions of section 6 are not violative of Article 14 of the Constitution.

It is not possible to put the test of reasonableness into the straight jacket of a narrow formula. The object to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed a subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an assential attribute of sovereignity and constitutional provisions relating to the power of taxation are regarded not as grant of power put as limitation upon the power which would otherwise be practically without limit. As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory or extortionate the reasonableness of the tax cannot be questioned.

A tax on land values and a tax on letting value though both are taxes under Entry 49 of List II cannot be clubbed together in order to test the reasonableness of one or the other for the purposes of Article 19 (1). But so far as the new Act is concerned the levy of 0·4 per cent. of the market value of the urban land is by no means confiscatory in effect.

It is not right to say as a general proposition that the imposition of tax with retrospective effect *per se* renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself. *Held*, in view of the legislative background of the present case the imposition of the tax retrospectively from 1st July, 1963 cannot be said to be an unreasonable restriction.

Held Madras Urban Land Tax Act 1966 is constitutionally valid.

Appeals from the Judgment and Orders, dated the 10th April, 1968 of the Madras High Court in Writ Petitions Nos. 387 of 1968, etc.

S. V. Gupte, Senior Advocate (*G. Ramanujam*, Government Pleader, Madras High Court and *A. V. Rangam*, Advocate, with him), for Appellants (In C.As. Nos. 21 to 23 of 1969) and the Respondents (In C.As. Nos. 46 ,47, 125 and 274 of 1969.

V. K. T. Chari, Senior Advocate (*T. N. C. Rangarajan* and *D. N. Gupta*, Advocates, with him), for Appellants (In C.As. Nos. 46 and 47 of 1969) and Respondents (In C.As. Nos. 21 and 23 of 1969).

V. K. T. Chari, Senior Advocate (*A. R. Ramanathan, T. N. C. Rangarajan* and *R. Gopalakrishnan*, Advocates, with him), for Appellant (In C.A. No. 125 of 1969).

K. C. Rajappa, Advocate and *S. Balakrishnan* and *S. Lakshminarasu*, Advocates of *Aiyar and Aiyar*, for Appellant (In C.A. No. 274 of 1969).

K. C. Rajappa, Advocate, *S. Balakrishnan* and *S. Laxminarasu*, Advocates of *Aiyar and Aiyar*, and *N. M. Ghatate*, Advocate, for Respondents (In C.A. No. 22 of 1969).

The Judgment of the Court was delivered by

Ramaswami, J.—In these appeals which have been heard together a common question of law arises for determination, namely, whether the Madras Urban Land Tax Act, 1966 (XII of 1966) is constitutionally valid.

In 1963 the Madras Legislature enacted the Madras Urban Land Tax Act, 1963 which came into force in the city of Madras on the 1st of July, 1963. In the Statement of Objects and Reasons of the 1963 Act it was stated that the Taxation Enquiry Commission and the Planning Commission were suggesting the need for imposing a suitable levy on lands put to non-agricultural use in urban areas. The State Government, after examining the report of the Special Officer, decided to levy a tax on urban land on the basis of market value of the land at the rate of 0.4 per cent. on such market value. Section 3 of the Act of 1963 (which will be referred to as the old Act) provided that there shall be levied and collected for every fasli year commencing from the date of the commencement of the Act, a tax on urban land from every owner of urban land at the rate of 0.4 per cent. of the average market value of the urban land in a sub-zone as determined under sub-section (2) of section 6. Section 7 provided for the determination of the highest and lowest market value in a zone. For determining the average market value, the Assistant Commissioner shall have regard to any matters specified in clauses (*a*) to (*e*) of sub-section (2) of section 6, namely :

(*a*) the locality in which the urban land is situated ;

(*b*) the predominant use to which the urban land is put, that is to say, industrial, commercial or residential ;

(*c*) accessibility or proximity to market, dispensary, hospital, railway station educational institution, or Government Offices ;

(*d*) availability of civil amenities like water supply, drainage and lighting ; and

(*e*) such other matters as may be prescribed.

The constitutional validity of Act XXXIV of 1963 was challenged and in *Buckingham & Carnatic Co., Ltd.* v. *State of Madras*[1] a Division Bench of the Madras High Court held that the impugned Act fell under Entry 49, List II of Schedule VII to the Constitution and was within the legislative competence of the State Legislature. But the Act was struck down on the ground that Article 14 of the Constitution was violated, because the charging section of the Act levied the tax on urban land

1. (1966) 2 M.L.J. 172.

not on the market value of such urban land but on the average value of the lands in the locality known as a sub-zone. The new Act (Act XII of 1966) was passed by the State Legislature after the decision of the Madras High Court. In the new Act provisions relating to fixation of average market value in the sub-zone were omitted. Instead, section 5 of the new Act provides that there shall be levied and collected from every year commencing from the date of the commencement of the Act a tax on each urban land from the owner of such urban land at the rate of 0.4 per cent. of the market value of such urban land. Section 2 (10) defines "owner" as follows :

"Owner" includes—

(*i*) any person (including a mortgagee in possession) for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purposes the rent or profits of the urban land or the building constructed on the urban land in respect of which the word is used ;

(*ii*) any person who is entitled to the kudiwaram in respect of any inam land ; but does not include—

(*a*) a *shrotriamdar* : or

(*b*) any person who is entitled to the melwaram in respect of any inam land but in respect of which land any other person is entitled to the kudiwaram.

Explanation.—For the purposes of clause (9) and clause (10) inam land includes lakhiraj tenures of land and *shrotriam* land.

Section 2 (13) defines 'land' to mean any land which is used or is capable of being used as a building site and includes garden or grounds, if any, appurtenant to a building but does not include any land which is registered as wet in the revenue accounts of the Government and used for the cultivation of wet crops."

Section 6 states : "For the purposes of this Act, the market value of any urban land shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be, such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act."

Section 7 provides for the submission of returns by the owner of urban land and reads :

"Every owner of urban land liable to pay urban land tax under this Act shall, within a period of one month from the date of the publication of the Madras Urban Land Tax Ordinance, 1966 (Madras Ordinance III of 1966) in the *Fort St. George Gazette*, furnish to the Assistant Commissioner having jurisdiction a return in respect of each urban land containing the following particulars, namely :

(*a*) name of the owner of the urban land,

(*b*) the extent of the urban land,

(*c*) the name of the division or ward and the street, survey number and sub-division number of the land and other particulars of such urban land, and

(*d*) the amount which in the opinion of the owner is the market value of the urban land."

Section 10 deals with the procedure for the determination of the market value by the Assistant Commissioner and states :

"(1) Where a return is furnished under section 7 the Assistant Commissioner shall examine the return and made such enquiry as he deems fit. If the Assistant Commissioner is satisfied that the particulars mentioned therein are correct and complete he shall, by order in writing determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(2) (*a*) Where on examination of the return and after the enquiry the Assistant Commissioner is not satisfied that the particulars mentioned therein are correct and complete he shall serve a notice on the owner either to attend in person or at his office on a date to be specified in the notice or to produce or cause to be produced on that date any evidence in which the owner may rely in support of his return.

(*b*) The Assistant Commissioner after hearing such evidence as the owner may produce in pursuance of the notice under clause (*a*) and such other evidence as the Assistant Commissioner may require on any specified points shall, by order in writing, determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(*c*) Where the owner has failed to attend or produce evidence in pursuance of the notice under clause (*a*) the Assistant Commissioner shall, on the basis of the enquiry made under clause (*a*), by order in writing determine the market value of the urban land and the amount or urban land tax payable in respect of such urban land."

Section 11 enacts :

"(1) Where the owner of urban land has failed to furnish the return under section 7 and the Assistant Commissioner has obtained the necessary information under section 9 he shall serve a notice on the owner in respect of each urban land specifying therein—

(*a*) the extent of the urban land,

(*b*) the amount which, in the opinion of the Assistant Commissioner, is the correct market value of the urban land, and direct him either to attend in person at his office on a date to be specified in the notice or to produce or cause to be produced on that date any evidence on which the owner may rely.

(2) After hearing such evidence, as the owner may produce and such other evidence as the Assistant Commissioner may require on any specified points, the Assistant Commissioner shall, by order in writing, determine the market value of the urban land and the amount of urban land tax payable in respect of such urban land.

(3) Where the owner has failed to attend or to produce evidence in pursuance of the notice under sub-section (1) the Assistant Commissioner shall, on the basis of the information obtained by him under section 9, by order in writing, determine the market value of the urban land and the amount of the urban land tax payable in respect of such urban land."

Section 20 provides for an appeal to the Tribunal from the orders of the Assistant Commissioner :

"(1) (*a*) Any assessee objecting to any order passed by the Assistant Commissioner under section 10 or 11 may appeal to the Tribunal within thirty days from the date of the receipt of the copy of the order.

(*b*) Any person denying his liability to be assessed under this Act may appeal to the Tribunal within thirty days from the date of the receipt of the notice of demand relating to the assessment :

Provided that no appeal shall lie under clause (*a*) or clause (*b*) of this sub-section unless the urban land tax has been paid before the appeal is filed.

(2) The Commissioner may, if he objects to any order passed by the Assistant Commissioner under section 10 or 11, direct the Urban Land Tax Officer concerned to appeal to the Tribunal against such order, and such appeal may be filed within sixty days from the date of the receipt of the copy of the order by the Commissioner.

(3) The Tribunal may admit an appeal after the expiry of the period referred to in clause (*a*) or clause (*b*) of sub-section (1) or in sub-section (2), as the case

may be, if it is satisfied that there was sufficient cause for not presenting it within that period.

(4) An appeal to the Tribunal under this section shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by such fee as may be prescribed.

(5) The Tribunal may after giving both parties to the appeal an opportunity of being heard, pass such orders thereon, as it thinks fit and shall communicate any such orders to the assessee and to the Commissioner in such manner as may be prescribed."

Section 30 confers power of revision in the Board of Revenue and is to the following effect :

" (1) The Board of Revenue may, either on its own motion or on application made by the assessee in this behalf, call for and examine the records of any proceeding under this Act (not being a proceeding in respect of which an appeal lies to the Tribunal under section 20) to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly :

Provided that the Board of Revenue shall not pass any order under this sub-section in any case, where the decision or order is sought to be revised by the Board of Revenue on its own motion, if such decision or order had been made more than three years previously :

Provided further that the Board of Revenue shall not pass any order under this section prejudicial to any party unless he has had a reasonable opportunity of making his representations. "

Section 33 states :

" (1) The Tribunal, the Board of Revenue, the Commissioner, the Assistant Commissioner, or the Urban Land Tax Officer or any other officer empowered under this Act shall, for the purposes of this Act, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (Central Act V of 1908), when trying a suit in respect of the following matters, namely :—

(*a*) enforcing the attendance of any person and examining him on oath ;

(*b*) requiring the discovery and production of documents ;

(*c*) receiving evidence on affidavits ;

(*d*) issuing commissions for the examination of witnesses ;

and any proceeding before the Tribunal, the Board of Revenue, the Commissioner, the Assistant Commissioners the Urban Land Tax Officer or any other officer empowered under this Act shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196, of the Indian Penal Code (Central Act XLV of 1860).

(2) In any case in which an order of assessment is passed *ex parte* under this Act, the provisions of the Code of Civil Procedure, 1908 (Central Act V of 1908), shall apply in relation to such order as it applies in relation to a decree passed *ex parte* by a Court."

The validity of the new Act was challenged in a group of writ petitions before the Madras High Court on various constitutional grounds. By a common judgment dated the 10th April, 1968 a Full Bench of five Judges overruled all the contentions of the petitioners with regard to the legislative competence of the Madras Legislature to enact the new Act. However, the Full Bench by a majority of 4 to 1 struck down section 6 of the new Act as being violative of Articles 14, 19 (1) (*f*) of the Constitution. The State of Madras and other respondents to the writ petitions (hereinafter

called the respondents for the sake of convenience) filed appeals Nos. 21 to 23 of 1969 under a certificate granted by the High Court under Articles 132 and 133 (1) (*a*), (*b*) and (*c*) of the Constitution. The writ petitioners (hereinafter called the petitioners) have filed C.As. Nos. 46, 47, 125 and 274 of 1969 against the same judgment on a certificate granted by the High Court under Article 132 of the Constitution.

The first question to be considered in these appeals is whether the Madras Legislature was competent to enact the legislation under Entry 49 of List II of Schedule VII of the Constitution which reads : "Taxes on lands and buildings". It was argued on behalf of the petitioners that the impugned Act fell under Schedule VII, List I, Entry 86, that is "Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies". The argument of Mr. V. K.T. Chari may be summarised was follows :

The impugned Act was, both in form and substance, taxation of capital and was hence beyond the competence of the State Legislature. To tax on the basis of capital or principal value of assets was permissible to Parliament under List I, Entries 86 and 87 and to State under Entry 48 of List II. Taxation of capital was the appropriate method provided for effecting the directive principle under Article 39 of the Constitution, namely, to prevent concentration of wealth. Article 366 (9) contains a definition of 'estate duty' with reference to the principal value. Entry 86 of List List (Taxes on capital value of assets exclusive of agricultural land) and Entry 88 (Duties in respect of succession to such property) form a group of entries the scheme of which is to carry out the directive principle of Article 39 (*c*). The Constitution indicated that capital value or principal value shall be the basis of taxation under these entries and, therefore, the method of taxation of capital or principal value was prohibited even to Parliament in respect of other taxes and to the State except in respect of Estate Duty on Agricultural land. Such in effect is the argument of Mr. V.K. T. Chari. But in our opinion there is no warrant for the assumption that entries 86, 88 of List I and Entry 48 of List II form a special group embodying any particular scheme. The directive principle embodied in Article 39 (*c*) applies both to Parliament and to the State Legislature and it is difficult to conceive how entries 86 to 88 of List I would exclude any power of the State Legislature to implement the same principle. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere *simplex enumeratio* of broad categories. We see no reason, therefore, for holding that the entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II. In our opinion there is no conflict between Entry 86 of List I and Entry 49 of List II. The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the assets. It is not a tax directly on the capital values of assets of individuals and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessee. But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which

are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping. The two taxes are entirely different in their basic concept and fall on different subject-matters.

In *Ralla Ram* v. *Province of East Punjab*[1], the Federal Court held that the tax levied by section 3 of the Punjab Urban Immoveable Property Tax Act, XVII of 1940 on buildings and lands situated in a specified area at such rate not exceeding twenty per cent of the annual value of such buildings and lands, as the Provincial Government may by notification in the official Gazette direct in respect of each such rating area was not a tax on income but was a tax on lands and buildings within the meaning of Item No. 42 of List II of the Seventh Schedule of the Government of India Act, 1935. In that case it was contended that under the provisions of the Punjab Act the basis of the tax was the annual value of the buildings and since the same basis was used in the Income-tax Act for determining the income from property and generally speaking the annual value is the fairest standard for measuring income and, in many cases, is indistinguishable from it, the tax levied by the impugned Act was in substance a tax on income. The Court pointed out that the annual value is not necessarily actual income, but is only a standard by which income may be measured and merely because the Income-tax Act had adopted the annual value as the standard for determining the income, it did not follow that, if the same standard is employed as a measure for any other tax, that latter tax becomes also a tax on income. It was held by the Court that in substance the property tax levied by section 3, Punjab Urban Immoveable Property Tax Act, 1940 fell within item 42 of the Provincial List and was not tax on income falling within item 54 of the Federal List although the basis of the tax was the annual value of the building. The same view has been expressed by this Court in *Sudhir Chandra Nawn* v. *Wealth-tax Officer*[2], wherein it was held that the power to levy tax on lands and buildings under Entry 49 of List II did not trench upon the power conferred on Parliament by Entry 88 of List I and, therefore, the enactment of the Wealth-Tax Act by Parliament was not *ultra vires*.

The problem in this case is the problem of characterisation of the law or classification of the law. In other words the question must be asked: what is the subject-matter of the legislation in its "pith and substance" or in its true nature and character for the purpose of determining whether it is legislation with respect to Entry 49 of List II or Entry 86 of List I. In *Gallahagher* v. *Lynn*[3], the principle is stated as follows:

"It is well established that you are to look at the true nature and character of the legislation the pith and substance of the legislation. If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object *e.g.*, to promote the health of the inhabitants, but may seek to achieve that object by invalid methods *e.g.*, direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed in 'respect of the forbidden subject."

1. (1949) F.L.J. 8 : (1949) 1 M.L.J. 213 : (1948) F.C.R. 207.
2. (1968) 2 S.C.J. 790 : (1968) 2 I.T.J. 724: A.I.R. 1969 S.C. 59.
3. L.R. (1937) A.C. 863 at 870.

In the case of *Subrahmanyam Chettiar* v. *Muttuswami Goundan*[1], Sir Maurice Gwyer, C.J. said :

> " It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that : *Citizens Insurance Company of Canada* v. *Parsons*[2], *Russell* v. *The Queen*[3] ; *Union Colliery Co., of British Columbia* v. *Bryden*[4]; *Att. Gen. for Canada* v. *Att. Gen., for British Columbia*[5] ; *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters*[6]. In my opinion this rule of interpretation is equally applicable to the Indian Constitution Act."

For the reasons already expressed we hold that in pith and substance the new Act in imposing a tax on urban land at a percentage of the market value is entirely within the ambit of Entry 49 of List II and within the competence of the State Legislature and does not in any way trench upon the field of legislation of Entry 86 of List I.

It was then said that as Entry 49 of List II provides for taxes on lands and buildings, the impugned Act which imposes tax on lands alone cannot be held to fall under that entry. It was submitted that when the Legislature taxed land deliberately the legislation fell under Entry 45 of List II *i.e.*, " land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights and alienation of revenues " and not under Entry 49 of that List. The legislative history of Entry 49 of List II does not however lend any support to this argument. Before the Government of India Act, 1935 lands and buildings were taxed separately and all that was done under the Government of India Act, 1935 and the Constitution was to combine the two entries relating to land and buildings into a single entry. Section 45-A of the Government of India Act, 1919 provided for making rules under the Act for the devolution of authority in respect of provincial subjects to local Governments, and for the allocation of revenues or other moneys to those Governments. The Government of India by a notification dated 16th December, 1920 made rules under that provision called the "Scheduled Tax Rules ". These Rules contained two schedules. The first Schedule contained eight items of tax or fee. The Legislative Council of a Province may without obtaining the previous sanction of the Governor-General make and take into consideration any law imposing for the purposes of the local Government any tax included in Schedule I. Schedule II contained eleven items of tax. In making a law imposing or authorising any local authority to impose for the purposes of such local authority any tax in Schedule II, the Legislative Council required no previous sanction of the Governor General. In Schedule II, item No. 2 was tax on land or land values and item 3 was a tax on buildings. In the Government of India Act, 1935 the two entries were combined and List II, Entry 42 is " Taxes on lands and buildings and *hats* and Windows ". The legislative history of Entry 49, List II does not, therefore, lend any support to the argument that Entry 49 of List II relating to tax on land and buildings cannot be separated. On the other hand we are of opinion that Entry 49 " Taxes on lands and buildings " should be construed as taxes on land and taxes on buildings and there is no reason for restricting the amplitude of the language used in the Entry. This view is also borne out by authorities. In *Raja Jagannath Baksh Singh* v. *The State of U.P.*[7], the question at issue was whether the tax imposed by the U.P. Government or land holdings under the U.P. Large Land Holdings Tax Act,

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1. (1940) F.C.R. 188 at 201 : (1941) 1 M.L.J. (Supp.) 1.
2. L.R. (1881) 7 A.C. 96.
3. L.R. (1882) 7 A.C. 829.
4. L.R. (1899) A.C. 580.
5. L.R. (1930) A.C. 111.
6. L.R. (1940) A.C. 513.
7. (1964) 1 S.C.R. 220.

1957 (U.P. Act XXXI of 1957) was constitutionally valid. It was held that the legislation fell under Entry 49 of List II and the tax on land would include agricultural land also. Similarly in *H.R.S. Murthy* v. *Collector of Chittoor and another*[1], it was held that the land cess imposed under sections 78 and 79 of the Madras District Boards Act (Mad. Act XIV of 1920) and Mines and Minerals (Regulation and Development) Act (LXVII of 1957) was a tax on land falling under Entry 49 of the State List. We are of opinion that the argument of Mr. V.K.T. Chari on this aspect of the case must be rejected.

We proceed to consider the argument that no machinery is provided for determining the market value and the provisions of the new Act, therefore, violate Article 14 of the Constitution. The argument was stressed by Mr. V.K.T. Chari that the guidance given under the 1963 Act has been dispensed with and the Assistant Commissioner is not bound to take into account, among other matters, the sale price of similar sites, the rent fetched for use and occupation of the land, the principles generally adopted in valuing land under the Land Acquisition Act and the compensation awarded in recent land acquisition proceedings. We see no justification for this argument. The procedure for determining the market value and assessment of urban land is described in Chapter III of the new Act. Section 6 provides that the market value of the urban land "shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be, such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act." It was said on behalf of the petitioners that the opinion which the Assistant Commissioner has to form is purely subjective and may be arbitrary. We do not think that this contention is correct. Having regard to the language and context of section 6 of the new Act we consider that the opinion which the Assistant Commissioner has to form under that section is not subjective but should be reached objectively upon the relevant evidence after following the requisite formalities laid down in sections 7 to 11 of the new Act. Instead of the Assistant Commissioner classifying the urban land and determining the market value in a zone, the present Act requires a return to be submitted by the owner mentioning the amount which, in the opinion of the owner, is the market value of the urban land. On receipt of the return, if the Assistant Commissioner is satisfied that the particulars mentioned are correct and complete, he may determine the market value as given by the owner of the land. If he is not satisfied with the return, he shall serve a notice on the owner asking him to attend his office with the relevant evidence in support of his return. After hearing the owner and considering the evidence produced, the Assistant Commissioner may determine the market value. In case the owner fails to attend or fails to produce the evidence, the Assistant Commissioner is empowered to assess the market value on the basis of an enquiry made by him. Section 11 prescribes the procedure for determining the market value when the owner fails to furnish a return as required under section 7. The section requires the Assistant Commissioner to serve a notice on the owner specifying amongst other things the amount, which in the opinion of the Assistant Commissioner, is the correct market value and directing the owner to attend in person at his office on a date specified in the notice or to produce any evidence on which the owner may rely. After hearing such evidence as the owner may produce and considering such other evidence as may be required, the Assistant Commissioner may fix the market value. The proceeding before the Assistant Commissioner is judicial in character and his opinion regarding the market value is reached objectively on all the materials produced before him. Section 20 provides for an appeal by the assessee objecting to the determination of the market value made by the Assistant Commissioner to a Tribunal within thirty days from the date of the receipt of the copy of the order. The Act requires that the Tribunal shall consist of one person only who shall be a judicial officer not below the rank of a Subordinate Judge. By section 30, the Board of Revenue is empowered either on its own motion or on

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1. (1964) 2 S.C.J. 557 : (1964) 2 M.L.J. (S.C.) 125 : (1964) 2 An. W.R. (S.C.) 125 : (1964) S.C.R. 666.

application made by the assessee in this behalf, to call for and examine the records of any proceedings under the Act (not being a proceeding in respect of which an appeal lies to the Tribunal under section 20), to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein, and if it appears to the Board of Revenue that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly. Section 32 enables the urban land tax officer, or the Assistant Commissioner, or the Board of Revenue or the Tribunal to rectify any error apparent on the face of the record at any time within three years from the date of any order passed by him or it. Section 33 confers power on the Assistant Commissioner to take evidence, to require discovery and production of documents and to receive evidence on affidavit etc. Thus, the Act envisages a detailed procedure regarding submission of returns, the making of an assessment after hearing objections and a right to appeal to higher authorities. We are hence unable to accept the contention of the petitioners that the provisions of section 6 of the new Act are violative of Article 14 of the Constitution.

It is necessary to state that the High Court decided the case in favour of the respondents mainly on the ground that investment of the power to determine value of the urban land under section 6 of the Act constituted excessive delegation of authority and so violative of Articles 19 (1) and 14 of the Constitution. (*see* the judgment of Veeraswami, J., who pronounced the main judgment in the High Court). But Mr. V. K. T. Chari did not support this line of reasoning in his arguments before this Court. On the other hand learned Counsel conceded that the power of determining the value of the urban land being judicial or quasi-judicial in character the doctrine of excessive delegation of authority had no application.

We pass on to consider the next contention raised on behalf of the petitioners namely that the Act should be struck down as an unreasonable restriction on the right to acquire, hold and dispose of property and as such violative of Article 19 (1) (*f*) of the Constitution. It was argued that the test of reasonableness would be that the tax should not be so high as to make the holding of the property or the carrying on of the activity (business or profession) which is subject to taxation, uneconomic according to accepted rates of yield. In this connection it was said that that the new Act by imposing a tax on the capital value at a certain rate was not correlated to the income or rateable value and, therefore, violates the requirement of reasonableness. We are unable to accept the proposition put forward by Mr. Chari. It is not possible to put the test of reasonableness into the straight jacket of a narrow formula. The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the Legislature and not to the Courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit. It was observed by this Court in *Rai Ramakrishna* v. *State of Bihar*[1] :

> " It is of course true that the power of taxing the people and their property is an essential attribute of the Government and Government may legitimately exercise the said power by reference to the objects to which it is applicable to the utmost extent to which Government thinks it expedient to do so. The objects to be taxed so long as they happen to be within the legislative competence of the Legislature can be taxed by the Legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation. The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the con-

1. (1964) 2 S.C.J. 749 : (1964) 1 S.C.R. 897 : A.I.R. 1963 S.C. 1667 at 1673.

tention raised by a citizen that that taxing statute contravenes Article 19 Courts would naturally be circumspect and cautious. Where for instance it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Courts would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the Court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes. This is illustrated by the decision of this Court in the case of *Kunnathat Thathunni Moopil Nair* v. *State of Kerala*[1] where taxing statute was struck down because it suffered from several fatal infirmities. On the other hand, we may refer to the case of *Jagannath Baksh Singh* v. *State of Uttar Pradesh*[2], where a challenge to the taxing statute on the ground that its provisions were unreasonable was rejected and it was observed that unless the infirmities in the impugned statute were of such a serious nature as to justify its description as a colourable exercise of legislative power, the Court would uphold a taxing statute."

As a general rule it may be said that so long as a tax retains its character as a tax and is not confiscatory, or extortionate the reasonableness of the tax cannot be questioned. Mr. Chari submitted that the existing property tax under section 100 of the City Municipal Corporation Act and the tax on urban lands under the new Act both enacted under Entry 49 of the State List, one of them imposing a tax on the capital value of urban lands and the other on the annual value of lands and buildings exhaust in unreasonably high proportion of income. For instance, it is pointed out that in W.P. No. 2835 of 1967 the annual income on property was Rs. 6,000 and the proposed market value for the lands alone comes to Rs. 10,40,000. The urban land tax at 0.4 per cent. of the market value is Rs. 4,160 and the income-tax at the rate applicable to the petitioner was Rs. 1,234. The total tax burden in the aggregate under the three heads was Rs. 6,794, which exceeds the rental income. In W.P. No. 3686 of 1967 the municipal annual value was Rs. 4,095, the property tax was Rs. 1,098 and the urban land tax at 0.4 per cent. was Rs. 1,523. The proportion of the two taxes together to yearly or annual municipal value worked out to Rs. 62.5 per cent. It was, therefore, said that the taxes put together would practically exhaust the total income and the charging section in the new Act was unreasonable. The answer to the contention is that the charge is on the market value of the urban land and not on the annual letting value on which the municipal property tax is based. The basis of the two taxes being different it is not permissible to club together the two taxes and complain of the cumulative burden. If the tax is on the market value of the urban land as it is in this case it does not admit of a complaint that it takes away an unreasonably high proportion of the income. A tax on land values and a tax on letting value, though both are taxes under Entry 49 of List II, cannot be clubbed together in order to test the reasonableness of one or the other for the purposes of Article 19 (1). But so far as the new Act is concerned we consider that the levy at 0.4 per cent. of the market value of the urban land is by no means confiscatory in effect. It was also pointed out by Mr. V. K. T. Chari that in certain cases the market value of the urban land was arrived at by applying what is known as the contractor's method not to the building which stands on the land whose value is ascertained by that means but to some other building on a different land taken for comparison. It was said that it was difficult enough for a man to apply the contractor's method of valuation to his own building which could be done by a competent architect after taking into account all measurements. But it is absolutely an impossible task to check up or make objections to the contractor's method applied to another man's property which cannot be trespassed upon. It was said that the contractor's method was the last resort in valuation when a building has to be valued apart from the land and that it was a wrong application of the formula to use it to value the land without the building particularly when valuation of land can be made by applying the principles of the Land Acquisi-

1. (1961) 2 S.C.J. 267 : (1961) 3 S.C.R. 77 : A.I.R. 1961 S.C. 552.

2. (1963) 1 S.C.R. 220 : A.I.R. 1962 S.C. 1563.

tion Act. But this argument has no bearing on the constitutional validity of the charging section or the machinery provisions of the Act. It is, however, open to the writ petitioners to challenge the validity of the particular valuation in any particular case by way of an appeal under a statute or to move the High Court for grant of writ under Article 226 of the Constitution.

The impugned Act provides for the retrospective operation of the Act. Section 2 states that except sections 19, 47 and 48, other sections shall be deemed to have come into force in the City of Madras on the 1st day of July, 1963 and section 19 and 47 shall be deemed to have come into force in the City of Madras on the 21st May, 1966.It also provides that section 48 shall come into force on the date of the publication of the Act in the *Fort St. George Gazette*. Section 6 enacts that the market values of the urban lands shall be estimated to be the price which in the opinion of the Assistant Commissioner or the Tribunal such urban land would have fetched or fetch if sold in the open market on the date of the commencement of the Act, that is, from 1st July, 1967. The urban land tax is, therefore, payable from 1st July, 1963. It is contended on behalf of the petitioners that the retrospective operation of the law from 1st July, 1963, would make it unreasonable. We are unable to accept the argument of the petitioner as correct. It is not right to say as a general proposition that the imposition of tax with retrospective effect *per se* renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself. Taking into account the legislative history of the present Act we are of opinion that there is no unreasonableness in respect of the retrospective operation of the new Act. It should be noticed that the Madras Act of 1963 came into force on 1st July, 1963, and provided for the levy of urban land tax at the same rate as that provided under the new Act. The enactment was struck down as invalid by the judgment of the Madras High Court which was pronounced on the 25th March, 1966. The Legislature by giving retrospective effect to Madras Act XII of 1966 that the urban land must be taxed on the date on which the 1963 Act came into force the new Act cured the defect from which the earlier Act was suffering. In *Rai Ramakrishna's case*[1] the question at issue was whether the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 (XVII of 1961) was violative of Article 19 (5) and (6) of the Constitution for the reason that it was made retrospective with effect from 1st April, 1950. It appears that the Bihar Finance Act, 1950 levied a tax on passengers and goods carried by public service motor vehicles in Bihar. In an appeal arising out of a suit filed by the passengers and owners of goods in a representative capacity the Supreme Court pronounced on the 12th December, 1960, a judgment declaring Part III of the said Act unconstitutional. Thereafter on Ordinance namely, Bihar Ordinance II of 1961 was issued on the 1st of August, 1961, by the State of Bihar. By this Ordinance the material provisions of the earlier Act of 1950 which had been struck down by this Court were validated and brought into force retrospectively from the date when the earlier Act had purported to come into force. Subsequently the provisions of the said Ordinance were incorporated in the Act namely the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 which was duly passed by the Bihar Legislature and received the assent of the President on 23rd September, 1961. As a result of the retrospective operation of this Act its material provisions were deemed to have come into force on 1st April, 1950, that is to say, the date on which the earlier Act of 1950 had come into force. The appellants challenged the validity of this Act of 1961. Having failed in their writ petition before the High Court the appellants came to this Court and the argument, was that the retrospective operation prescribed by section 1 (3) and by a part of section 23 (*b*) of the Act so completely atlered the character of the tax proposed to be retrospectively recovered that it introduced a serious infirmity in the legislative competence of the Bihar Legislature itself. The argument was rejected by this Court and it was held that having regard to the relevant facts of the case the

1. (1964) 2 S.C.J. 749 : (1964) 1 S.C.R. 897 : A.I.R. 1963 S.C. 1667 at 1673.

restrictions imposed by the said retrospective operation was reasonable in the public interest under Article 19 (5) and (6) and also reasonable under Article 304 (*b*) of the Constitution. In our opinion the ratio of this decision applies to the present case where the material facts are of a similar character.

In this context a reference may be made to a recent review of retroactive legislation in the United States of America :

> "It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small repairs." Moreover the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus the interest in the retroactive curing of such a defect in the administration of Government outweighs the individual's interest in benefiting from the defect .... The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount Governmental interest in obtaining adequate revenues but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of Government among those who benefit from it. Indeed, as early as 1935 one commentator observed that "arbitrary retroactivity" may continue .... to rear its head in tax briefs but for practical purposes in this field it is as dead as wager of law."

(Charles B. Hochman in 73 Harvard Law Review 692 at page 705).

In view of the legislative background of the present case we are of opinion that the imposition of the tax retrospectively from 1st July, 1963, cannot be said to be an unreasonable restriction. We, therefore, reject the argument of the petitioners on this aspect of the case.

For these reasons we hold that the Madras Urban Land Tax Act, 1966 (Act of 1966) must be upheld as constitutionally valid. We accordingly set aside the judgment of the Madras High Court dated the 10th April, 1968, and order that writ petitions filed by the petitioners should be dismissed. In other words C.A. Nos. 21 to 23 are allowed and C. As. Nos. 46, 47, 125 and 274 are dismissed. There will be no order with regard to costs of these appeals.

S.V.J. — *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C.A. VAIDIALINGAM, JJ.

The Co-operative Central Bank Ltd., and others, etc. .. *Appellants**

v.

The Additional Industrial Tribunal, Andhra Pradesh, Hyderabad and others, etc. .. *Respondents.*

The Andhra Pradesh Co-operative Societies Act (VII of 1964), sections 16 (5), 61 and 62—Industrial Disputes Act (XIV of 1947), section 10 (1) (d)—Dispute between Co-operative Central Bank and their workmen relating to number of service conditions viz., *Salary and allowances etc.—Jurisdiction of Registrar to decide under section 61—Reference to Industrial Tribunal by the Government—Validity of.*

The Andhra Pradesh Co-operative Societies Act (VII of 1964) and Industrial Disputes Act (XIV of 1947)—Service conditions subject matter of bye-laws—Bye-laws, whether law or have the force of law—Scope of Bye-laws—Competency of Industrial Tribunal to alter or vary, bye-law in granting relief.

The interpretation already placed by this Court, in Civil Appeal No. 358 of 1967, on the provisions of section 91 (1) of the Maharashtra Act XXXII of 1961 is

*C. As. Nos. 2093 and 2094 of 1961. 3rd April, 1969.

fully applicable to the provisions of section 61 of the Andhra Pradesh Co-operatives Societies Act VII of 1964. In deciding these appeals, one must proceed on the basis that section 61 of the Act requires reference of a dispute to the Registrar only if the dispute is capable of being resolved by the Registrar or his nominee and further, the dispute between the co-operative society and the employee touches the business of the society in the sense explained by this Court in that case.

Held, the dispute covered by the first issue referred to the, Industrial Tribunal could not possibly be referred for decision to the Registrar under section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an industrial tribunal dealing with an industrial dispute. The Registrar could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employee of a registered society; but the meaning given to the expressions "touching the business of the society" makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. The position is clarified by the provisions of sub-section (4) of section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under section 61; by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the rules and bye-laws. The provisions of the Act, the rules and the bye laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. In respect of the dispute relating to the alteration of various conditions of service, the Registrar or other person dealing with it under section 62 of the Act is not competent to grant the relief claimed by the workmen at all. This dispute is not a dispute covered by the provisions of section 61 of the Act. Such a dispute is not contemplated to be dealt with under section 62 of the Act and must be held to be outside the scope of section 61.

The bye-laws of a co-operative society framed in pursuance of the provisions of the Act cannot be held to be law or to have force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules the rules so framed have the force of statute and are deemed to be incorporated as a part of the statute. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Act to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute. In respect of bye-laws laying down conditions of service of the employees of the society, the bye-laws would be binding btewcen the society and the emplyees just in the same manner as conditions of service laid down by contract between the parties. After such bye-laws laying down the conditions of service are made and any person enters the employment of a society those conditions of service will have to be treated as conditions accepted by the employees when entering the service and will thus bind him like conditions of service specially forming part of the contract of service. The bye-laws that can be framed by a society under the Act are similar in nature to the Articles of Association of a company incorporated under the Companies Act and such articles of association have never been held to have the force of law. The jurisdiction which is granted

to industrial tribunals by the Industrial Disputes Act is not the jurisdiction of merely administering the existing laws and enforcing existing contracts. Industrial tribunals have the right even to vary contracts of service between the employer and the employees which jurisdiction can never be exercised by a civil Court or a Registrar acting under the Co-operative Societies Act, so that the circumstance that, in granting relief on the various service conditions the Tribunal will have to vary the special bye-laws framed by the Co-operative Bank does not lead to the inference that the tribunal would be incompetent to grant the reliefs sought in this reference. The reliefs could only be granted by the Industrial Tribunal and could not fall within the scope of the powers of the Registrar dealing with a dispute under section 61 of the Act.

The provisions of section 16 (5) of the Act is irrelevant when considering the scope of the jurisdiction of the Registrar under section 61 of the Act. The Registrar could not have granted relief under section 16 (5) of the Act.

Appeals from the Judgment and Order dated the 5th August, 1968 of the Andhra Pradesh High Court in Writ Petitions Nos. 2339 and 2742 of 1968.

C.B. Agarwala, Senior Advocate (*K. Srinivasa Murthy, B. P. Singh* and *Naunit Lal*, Advocates, with him, for the Appellants (In both).

A. S. R. Chari and *M. K. Ramamurthi*, Senior Advocates (*Mrs. S. Pappu, Madan Mohan J. Ramamurthi, Vineet Kumar, P. S. Khera* and *Miss Bindra Thakur*, Advocates, with them), for Respondent No. 2 (in both).

The Judgment of the Court was delivered by

Bhargava, J.—An industrial dispute arose between 25 Co-operative Central Banks in the State of Andhra Pradesh and their workmen represented by the Andhra Pradesh Bank Employees Federation, Hyderabad, which was referred by the Government of Andhra Pradesh to the Industrial Tribunal, Hyderabad, under section 10 (1) (*d*) of the Industrial Disputes Act No. XIV of 1947. The subject-matter of the dispute was divided into three issues. The first issue comprised a number of service conditions, *viz.*, (1) Salary Scalse and Adjustments (2) Dearness Allowance (3) Special Allowances (4) other Allowances (5) Uniforms and Washing Allowances for subordinate staff (6) Conveyance Charges (7) Provindent Fudd and Gratuity (8) Leave Rules (9) Joining Time on transfer, (10) Rules relating to departmental enquiry against employees for misconduct (11) Probationary Period and Confirmation (12) Working Hours and Overtime Allowance. (13) Age of Retirement, (14) Security, (15) Common Good Fund, (16) Service Conditions and (17) Promotions. The second and the third issues both related to the question whether the transfers of some employees of two of the Banks, The Vijayawada Co-operative Central Bank Ltd., Vijayawada, and The Vizianagaram Co-operative Central Bank Ltd., Vizainagaram, were justified and, if not to what reliefs were the employees entitled. Before the Industrial Tribunal, one of the grounds raised on behalf of the banks was that the reference of the disputes to the Tribunal was invalid, because such disputes were required to be referred for decision to the Registrar of the Co-operative Societies under section 61 of the Andhra Pradesh Co-operative Societies Act No. VII of 1964 (hereinafter referred to as "the Act") and the effect of the provisions of the Act was to exclude the jurisdiction of the Industrial Tribunals to deal with the same disputes under the Industrial Disputes Act. Various other pleas were also taken by the banks in resisting the claims of the workmen, but in these appeals, we are not concerned with them, because the Tribunal dealt with the point, mentioned by us above, as a preliminary issue and rejected the contention of the banks. Twenty-four of the banks thereupon challenged the preliminary decision of the Tribunal on this question, treating it as a preliminary award, by filing two Writ Petitions Nos. 2339 and 2742 of 1968 under Article 226 of the Constitution in the High Court of Andhra Pradesh. The High Court also rejected the plea of the Banks. These two appeals haue been brought up before us by certificate against the orders of the High Court bismissing the two writ petitions. In Civil Appeal No. 2093 of 1968, the appellants are 10 banks who were petitioners before the High

Court in Writ Petition No. 2339 of 1968, while 2 of the petitioner-banks in that writ petition have been impleaded as respondents. In Civil Appeal No. 2094 of 1968, the appellants are also 10 banks who had joined in filing the other Writ Petition No. 2742 of 1968 in the High Court, while one of the petitioner-banks in that writ petition has been impleaded as respondent, and another has not joined the appeal as a party. In these appeals, therefore we are only concerned with one single qustion as to whether the jurisdiction of the Industrial Tribunal to adjudicate on the industrial dispute referred to it under section 10 (1) (*d*) of the Indstrial Disputes Act was barred by the provisions of section 61 of the Act.

The Tribunal, and the High Court in rejecting the plea taken on behalf of the banks, expressed the view that the disputes actually referred to the Tribunal were, not capable of being decided by the Registrar of the Co-operative Societies under section 61 of the Act and, consequently, the reference to the Industrial Tribunal under the Industrial Disputes Act was competent. Learned Counsel appearing on behalf of the banks took us through the provisions of the Act to indicate that, besides being a local and special Act, it is a self contained Act enacted for the purpose of successful working of co-operative societies, including co-operative banks, and there are provisions in the Act which clearly exclude the applicability of other laws if they happen to be in conflict with the provisions of the Act. It is no doubt true that the Act is an enactment passed by State Legislature which received the assent of the President, so that, if any provision of a Central Act, including the Industrial Disputes Act, is repugnant to any provision of the Act, the provision of the Act will prevail and not the provision of the Central Industrial Disputes Act. The general proposition urged that the jurisdiction of the Industrial Tribunal under the Industrial Disputes Act will be barred if the disputes in question can be competently decided by the Registrar under section 61 of the Act is, therefore, correct and has to be accepted. The question, however, that has to be examined is whether the industrial dispute referred to the Tribunal in the present cases was such as was required to be referred to the Registrar and to be decided by him under section 61 of the Act.

In order to properly appreciate the submissions which have been made on behalf of the banks, by their Counsel, it is necessary to set out the provisions of sections 16, 61, 62 and 133 of the Act which are as follows :—

"16. *Amendment of bye-laws of a society* :—(1) No amendment of any bye-law of a society shall be valid unless such amendment has been registered under this Act. Where such an amendment is not expressed to come into operation on a particular day, then, it shall come into force on the day on which it is registered.

(2) Every proposal for such amendment shall be forwarded to the Registrar who shall, if he is satisfied that the proposed amendment fulfils the conditions specified in sub-section (1) of section 7, register the amendment within a period of sixty days from the date of receipt of such proposals :

Provided that the Government may, for sufficient cause which shall be recorded in writing, extend the said period for a further period of sixty days.

(3) The Registrar shall forward to the society a copy of the registered amendment together with a certificate signed and sealed by him, and such certificate shall be conclusive evidence that the amendment has been duly registered.

(4) Where the Registrar is not so satisfied, he shall communicate by registered post the order of refusal together with the reasons therefor, to the society within the period specified in sub-section (2).

(5) If in the opinion of the Registrar, an amendment of the bye-laws of a society is necessary or desirable in the interest of such society or of the co-operative movement, he may, in the manner prescribed, call upon the society, to make any amendment within such time as he may specify. If the society fails to make such an amendment within the time so specified the Registrar may, after giving the society an opportunity of making its representation, register such amendment and forward to the socity by registered post a copy of the amendment together

with a certificate signed by him; such a certificate shall be conclusive evidence that the amendment has been duly registered; and such an amendment shall have the same effect as an amendment of any bye-law made by the society.

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61. *Disputes which may be referred to the Registrar* :—

(1) Notwithstanding anything in any law for the time being in force, if any dispute touching the constitution, management or the business of a society, other than a dispute regarding disciplinary action taken by the society or its committee against a paid employee of the society, arises—

(*a*) among members, past members and persons claiming through member, past members and deceased members; or

(*b*) between a member, past member or person claiming through a member past member or deceased member and the society, its committee or any officer, agent or employee of the society; or

(*c*) between the society or its committee and any past committee, any officer agent or employee, or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society; or

(*d*) between the society and any other soceity;

such dispute shall be referred to the Registrar for decision.

Explanation.:—For the purposes of this sub-section a dispute shall include—

(*i*) a cliam by a society for any debt or other amount due to it from a member past member or the nominee, heir or legal representative of a deceased member, whether such debt or other amount be admitted or not;

(*ii*) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or other amount due to it from the principal debtor as a result of the default of the principal debtor whether such debt or other amount due be admitted or not;

(*iii*) a claim by a society against a member, past member or the nominee, heir or legal representative of a deceased member for the delivery of possession to the society of land or other immovable property resumed by it for breach of the conditions of assignment or allottment of such land or other immovable property.

(2) If any question arises whether a dispute referred to the Registrar under this section is a dispute touching the constitution, management or the business of a society, such question shall be decided by the Registrar.

(3) (*a*) Every dispute relating to, or in connection with, any election to a committee of a society referred to in clause (*a*) of sub-section (3) of section 31, shall be referred for decision to a Subordinate Judge or where there is no Subordinate Judge, to the District Judge having jurisdiction over the place where the main office of the society is situated, whose decision thereon shall be final.

(*b*) Every dispute relating to or in connection with any election to a committee of such class of societies as may, by notification in the Andhra Pradesh Gazette, be specified by the Government in this behalf and referred to in clause (*b*) of sub-section (3) of section 31, shall be referred for decision to a District Munsif having jurisdiction over the place where the main office of the society is situated, and his decision thereon shall be final.

(4) Every dispute relating to, or in connection with, any election to a committee shall be referred under sub-section (1) of sub-section (3) only after the date of declaration of the result of such election.

62. *Action to be taken by the Registrar on such reference* :—

(1) The Registrar may, on receipt of the reference of a dispute under section 61,—

(*a*) elect to decide the dispute himself; or

(*b*) transfer it for disposal to any person who has been invested by the Government with powers in that behalf; or

(*c*) refer it for disposal to an arbitrator.

(2) Where the reference relates to any dispute involving immovable property, the Registrar or such person or arbitrator, may order that any person be joined as a party who has acquired any interest in such property subsequent to the acquisition of interest therein by a party to the reference and any decision that may be passed on the reference by the Registrar, or the person or the arbitrator aforesaid, shall be binding on the party so joined as if he were an original party to the reference.

(3) The Registrar may, by order for reasons to be recorded therein, withdraw any reference transferred under claue (*b*) of sub-section (1) or referred under clause (*c*) of that sub-section and may elect to decide the dispute himself or transfer it to any other person under clause (*b*) of sub-section (1) or refer it to any other arbitrator under clause (*c*) of that sub-section.

(4) The Registrar, such person or arbitrator shall decide the dispute in accordance with the provisions of this Act and the rules and bye-laws and such decision shall, subject to the provisions of section 76, be final. Pending final decision on the dispute, the Registrar, such person or arbitrator, as the case may be, may make such interlocutory orders as he may deem necessary in the interests of justice.

133. *Act to override other laws*:—The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law."

Reliance was placed on the non-obstante clause "Notwithstanding anything in any law for the time being in force" occurring in section 61 of the Act which has the effect that a dispute covered by this section must necessarily be referred to the Registrar for decision, so that it cannot be referred to any other authority under any other law. Further strength is sought in support of this proposition from the provisions of section 133 of the Act which clearly lays down that the provisions of the Act have overriding effect if there be any provision in any other law inconsistent with the provisions of the Act. Then, it was argued that the language of section 61 of the Act is wide enough to cover the disputes referred to the Tribunal in these cases, because the disputes are between co-operative societies and their employees and they touch the business of the co-operative societies. In support of this submission, learned Counsel referred us to a number of decisions of various High Courts in which the scope of the provisions contained in section 61 of the Act or of similar provisions in other local enactments was considered. Most of those decisions were concerned with laying down the meaning of the expression "touching the business of the society" so as to include within its scope disputes of different nature between the co-operative societies and their employees. The cases which have been brought to our notice are:

(1) a decision of a learned single Judge of the Bombay High Court in *G.I.P. Railway Employees Co-operative Bank Ltd.* v. *Bhikhaji Merwanji Karanjia—Employee*[1]. In which a similar provision contained in section 54 of the Bombay Co-operative Socities Act VII of 1925 was interpreted;

(2) a decision in *Sagar Motor Transport Karamchari Union, Sagar* v. *Amar Kamgar Passenger Transport Company Co-operative Society, Sagar and another*[2], where the Madhya Pradesh High Court interpreted section 55 (2) of the Madhya Pradesh Co-operative Societies Act, 1960 which required a dispute regarding terms of employ-

1. A.I.R. 1943 Bom. 341.
2. (1969) 18 Indian Factories and Labour Reports 27.

ment, working conditions and disciplinary action taken by a society, arising between a society and its employees, to be decided by the Registrar or any officer appointed by him ;

(3) a decision of a Full Bench of the Madras High Court in *M.S. Madhava Rao and others* v. *D.V. K. Surya Rao, Member of the Pithapuram Co-operative Bank, Pithapuram and others*[1], in which section 51 of the Madras Co-operative Societies Act VI of 1932, which was very similar to section 61 of the Act, was interpreted ; and

(4) a decision of a Full Bench of the Bombay High Court in *Farkhundali Nannhay* v. *Potdar (F.B.)*[2], in which also section 54 of the Bombay Co-operative Societies Act VII of 1925 came up for interpretation.

Learned Counsel for the appellants also brought to our notice a decision of a single Judge of the Calcutta High Court in *Co-operative Milk Societies Union, Ltd.* v. *State of West Bengal and others*[3], where a dispute as to wages, wage-scales and dearness allowance was held not to be a dispute within the meaning of that word as defined in the Bengal Co-operative Societies Act, 1940, and sought to distinguish it on the ground that the decision in that case turned on the meaning specially given in that Act to the word " dispute ".

It appears to us that it is not necessary to examine in detail the reasons given by the High Courts in the above-cited cases for the interpretation placed by them on provisions similar to section 61 of the Act in view of a very recent decision of this Court in *The Deccan Merchants Co-operative Bank Ltd.* v. *Messrs. Dalichand Jugraj Jain and others*[4]. In that case, this Court had to interpret section 91 of the Maharashtra Co-operative Societies Act, 1960 (Maharashtra Act XXXII of 1961), the relevant provision of which is reproduced below :—

" 91 (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if both the parties thereto are one or other of the following :—

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society ;

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One of the questions which the Court formulated as requiring an answer was : what is the meaning of the expression " touching the business of the society "? In order to decide this question, the Court analysed the provisions of section 91 (1) and held:

" Five kinds of disputes are mentioned in sub-section (1) ; first, disputes touching the constitution of a society ; secondly, disputes touching election of the office-bearers of a society ; thirdly, disputes touching the conduct of general meetings of a society ; fourthly, disputes touching the management of a society ; and fifthly, disputes touching the business of a society. It is clear that the word " business " in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word " business " has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws".

1. I.L.R. (1953) Mad. 1047 : (1953) 2 M.L.J. 340 : A.I.R. 1954 Mad. 103.
2. (1962) 1 L.L.J. 51.
3. (1958) 2 L.L.J. 61.
4. A.I.R. 1969 S.C. 1320.

In that case, this Court was concerned with the question whether a dispute touching the assets of a society was a dispute touching the business of the society, and it was in that context that the interpretation mentioned above was given by this Court. In considering the full scope of section 91 (1) of the Maharashtra Act XXXII of 1961, the Court further proceeded to hold :—

> "While we agree that the nature of business which a society does can be ascertained from the objects of the society, it is difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects can be said to be part of its business. We, however, agree that the word "touching" is very wide and would include any matter which relates to or concerns the business of a society, but we are doubtful whether the word "affects" should also be used in defining the scope of the word "touching".

This comment was made when taking notice of the decision of the Full Bench of the Bombay High Court in *Farkhundali* v. *Potdar*[1]. The Court also held :—

> "One other limitation on the word "dispute" may also be placed and that is that the word "dispute" covers only those disputes which are capable of being resolved by the Registrar or his nominee."

Considering the similarity between section 61 of the Act and section 91 (1) of the Maharashtra Act XXXII of 1961, we are of the opinion that the interpretation already placed by this Court on the provisions of section 91 (1) of the Maharashtra Act XXXII of 1961 is fully applicable to the provisions of section 61 of the Act with which we are concerned. Consequently, in deciding these appeals, we must proceed on the basis that section 61 of the Act requires reference of a dispute to the Registrar only if the dispute is capable of being resolved by the Registrar or his nominee, and further, the dispute between the co-operative society and the employee touches the business of the society in the sense explained by this Court in that case.

Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society ; but the meaning given to the expression "touching the business of the society", in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. Further, the position is clarified by the provisions of sub-section (4) of section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under section 61 ; by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of bringing facts to our notice in the present appeals, the Rules farmed by

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1. (1962) 1 Lab L J. 51.

the Andhra Pradesh Government under the Act, and the bye-laws of one of the appellant-banks have been placed on the Paper-books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service ,which the workmen want to be altered to their benefit, have thus been laid down by the bye-laws, so that any alteration in those conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under section 62 (4) of the Act he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws. It may also be noticed that a dispute referred to the Registrar under section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator by the Registrar. Such person or arbitrator, when deciding the dispute, will also be governed by the mandate in section 62 (4) of the Act, so that he will also be bound to reject the claim of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that, in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under section 62 of the Act is not competent to grant the relief claimed by the workmen at all. On the principle laid down by this Court in the case of *The Deccan Merchants Co-operative Bank Ltd.*[1], therefore, it must be held that this dispute is not a dispute covered by the provisions of section 61 of the Act. Such a dispute is not contemplated to be dealt with under section 62 of the Act and must, therefore, be held to be outside the scope of section 61.

In this connections, we may take notice of the view expressed by a learned single Judge of the Madras High Court in *South Arcot Co-operative Motor Transport Society, Ltd. (for ex-servicemen)* v. *Syed Batcha and others*[2], where dealing with an industrial claim, the learned Judge held :—

> " Therefore, in regard to an industrial claim, like the retrenchment compensation, the remedy for the worker would be only to enforce it by the machinery created by the Industrial Disputes Act, namely, by section 10 and 33 C (2). The Madras Co-operative Societies Act being itself a special statute, the authority, acting under it, would have no jurisdiction beyond what the enactment itself conferred on him. He could not, therefore, have jurisdiction to decide a dispute under the Industrial Disputes Act."

That decision also related to section 51 of the Madras Co-operative Societies Act, 1932, which was similar in terms to section 61 of the Act.

Learned Counsel appearing on behalf of the appellant-banks, however, urged a new point to challenge the juridiction of the Industrial Tribunal to deal with the dispute relating to conditions of service to the effect that the conditions of service having been made the subject matter of bye-laws, an Industrial Tribunal will not be competent to alter them, because even an Industrial Tribunal has no jurisdiction to make orders contrary to law. For this purpose., he referred us to a number of decisions of this Court in *Dalmia Cement (Bharat) Ltd., New Delhi* v. *Their Workmen and another*[3]; *The Management of Marina Hotel* v. *The Workmen*[4]; *Cinema Theatres* v. *Their Workmen*[5]; and *The Hindustan Times Ltd., New Delhi* v. *Their Workmen and vice versa*[6]. In all these cases, it was held that an Industrial Tribunal acted illegally in prescribing leave in excess of the number of days laid down by the Delhi Shops and Establishments Act, 1954. In section 22 of that Act there was a specific prohibition that leave for sickness or casual leave with full wages shall not exceed 12 days ; and it was held that a direction made by the Tribunal granting to the workmen more than 12 days' sickness or casual leave was illegal. The principle of the decisions in these

1. A.I.R. 1969 S.C. 1320.
2. (1960) 2 M.L.J. 573 : I.L.R. (1961) Mad. 483 : (1960) 2 L.L.J. 693.
3. (1961) 2 L.L.J. 130.
4. (1962) 3 S.C.R. 1 : (1963) 1 S.C.J. 394.
5. (1964) 2 L.L.J. 128.
6. (1964) 1 S.C.R. 234 : (1964) 2 S.C.J. 1.

cases does not, however, appear to us to be applicable to the cases before us, because, in the present case, there is no prohibition contained in the Act that the conditions of service prescribed are not to be altered. The argument on behalf of the banks, however, was that the bye-laws, which contained the conditions of service, are themselves law, so that any direction made by an Industrial Tribunal altering a condition of service contained in a bye-law would be an order contrary to law and, hence, illegal.

We are unable to accept the submission that the bye-laws of a co-operative society framed in pursuance of the provisions of the Act can be held to be law or to have the force of law. It has no doubt been held that, if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute. That principle, however, does not apply to bye-laws of the nature that a co-operative society is empowered by the Acs to make. The bye-laws that are contemplated by the Act can be merely those which govern the internal management, business or administration of a society. They may be binding between the persons affected by them, but they do not have the force of a statute. In respect of bye-laws laying down conditions of service of the employees of a society, the bye-laws would be binding between the society and the employees just in the same manner as conditions of service laid down by contract between the parties. In fact, after such bye-laws laying down the conditions of service are made and any person enters the employment of a society those conditions of service will have to be treated as conditions accepted by the employee when entering the service and will thus bind him like conditions of service specifically forming part of the contract of service. The bye-laws that can be framed by a soceity under the Act are similar is nature to the Articles of Association of a Company incorporated under the Companies Act and such Articles of Association have never been held to have the force of law. In a number of cases, conditions of service for industries are laid down by Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1964 and it has been held that, though such Standing Orders are binding between the employers and the employees of the industry governed by these Standing Orders, they do not have such force of law as to be binding on Industrial Tribunal adjudicating an industrial dispute. The jurisdiction which is granted to Industrial Tribunal by the Industrial Disputes Act is not the jurisidction of merely administering the existing laws and enforcing existing contracts. Industrial Tribunals have the right even to vary contracts of service between the employer and the employees which jurisdiction can never be exercised by a civil Court or a Registrar acting under the Co-operative Societies Act, so that the circumstance that, in granting relief on issue No. 1, the Tribunal will have to vary the special bye-laws framed by the Co-operative Bank does not lead to the inference that the Tribunal would be incompetent to grant the reliefs sought in this reference. In fact, the reliefs could only be granted by the Industrial Tribunal and could not fall within the scope of the powers of the Registrar dealing with a dispute under section 61 of the Act.

We may also, in this connection, take notice of the submission made by learned Counsel that the Registrar could have granted relief under section 16 (5) of the Act if he thought that it was advisable to grant that relief to the workmen. In our opinion, this submission must be rejected for two reasons. The first reason is that action taken by the Registrar under section 16 (5) of the Act will not be a decision on a dispute referred to him under section 61 of the Act. When dealing with the dispute under section 61 of the Act, the Registrar is bound to decide the dispute in accordance with the existing bye-laws, so that, if the dispute relates to alteration of conditions of service laid down in the bye-laws, he will be incompetent to grant the relief claimed. It is also to be noticed that a dispute referred to a Registrar under section 6 of the Act may be transferred for disposal to a person who has been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator. On the face of it, such person or arbitrator cannot possibly exercise the powers of the Registrar under section 16 (5) of the Act. The second

reason is that, under section 16 (5) of the Act, the power given to the Regisratr to propose amendments in the bye-laws and to enforce them if the proposal is not accepted by a society is to be exercised only when the Registrar is of the opinion that it is necessary or desirable to do so in the interests of such society or of the co-operative movement. Amendments in bye laws under section 16 (5) of the Act are not contemplated in the interests of the workmen or for the purpose of resolving industrial disputes. The provisions of section 16 (5) of the Act thus appear to us to be irrelevant when considering the scope of the jurisdiction of the Registrar under section 16 of the Act. Consequently, the decision of the High Court holding that the Tribunal had jurisdiction to deal with the industrial dispute referred to it must be upheld.

We may also take notice of an argument advanced at the last stage by learned Counsel appearing on behalf of the banks that, in any case matters covered by issues Nos. 2 and 3 referred to the Tribunal could have been competently decided by the Registrar, and the reference in respect of those two issues at least should be held to be incompetent. We do not think that at this stage there is any need for us to decide this question, because such a point was not raised at all in the petitions filed under Article 226 of the Constitution before the High Court. In those petitions, the competence of the reference to the Industrial Tribunal as a whole, was challenged on the ground that it was barred because of the jurisdiction of the Registrar to deal with the dispute under section 61 of the Act. Consequently, we need not deal with the question whether a particular issue forming part of the reference has been competently referred or not.

The appeals fail and are dismissed with costs. One hearing fee.

S.V.J. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND G. K. MITTER, JJ.

Maganti Subrahmanyam (dead) by his legal representatives ... *Appellants**

v.

The State of Andhra Pradesh ... *Respondent.*

Andhra Pradesh (Andhra Area) Estates Communal Forest and Private Lands (Prohibition of Alienation) Act (1947) and Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Effect—Later enactment, if repeals the earlier one—Section 2 (b) and section 4 (1) and (3)—Forest land,—Meaning of.

It is no doubt true that the Preamble to the Andhra Pradesh (Andhra Area, Estates Communal Forest and Private Lands (Prohibition of Alienation) Act, 1947, shows that it was enacted to prevent indiscriminate alienation of communal forest and private lands pending enactment of legislation for acquiring the interests of landholders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the preamble the Act is only a temporary Act. The enactment of the later Act, the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 cannot be considered as repealing the earlier Act merely because the later Act has the effect of repealing permanancy settlements in the State and the acquisition of the interests of landholders in permanently settled and certain other estates.

The definition of 'forest land' in section 2 (*b*) of the Act is an inclusive one and it does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act. The District Judge is the competent authority under section 4 of the Act to determine disputes as to the nature of the land.

* C.A. No. 614 of 1966. 17th April, 1969.

Appeal by Special Leave from the Judgment and Order dated the 24th March, 1965 of the Andhra Pradesh High Court in Civil Revision Petition No. 966 of 1962.

A. V. V. Nair, Advocate, for Appellant.

P. Ram Reddy, Senior Advocate (*B. Parthasarathy*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Mitter, J.—This appeal by Special Leave is from a common judgment and order of the High Court of Madras disposing of three Revision Applications arising out of O.P. No. 95 of 1948 filed under section 4 (3) and (4) of the Andhra Pradesh (Andhra Area) Estates Communal Forest and Private Lands (Prohibition of Alienation) Act, 1947 (hereinafter called the 'Act').

The central question in this appeal is, whether certain transfers of lands alleged to be forest lands made by the 6th respondent herein become void and inoperative under section 4 of the Act. The said respondent who was a big landholder granted a patta to his wife, 7th respondent, for Ac. 100-00 of land on 9th November, 1944. Another patta was similarly granted to the appellant in respect of Ac. 90-00 of land on 25th November, 1944. On the same day, respondent No. 6 granted a third patta for Ac. 200-00 of land to respondents 2 to 5. The Act came into force on 25th October, 1947. On 15th October, 1948 Original Petition No. 95 of 1948 was filed in the District Court of Eluru by two ryots for a declaration that the alienations were void and did not confer any rights on the alienees. Thereafter the said petition was split into two parts, O.P. No. 95 of 1948 being directed against respondents 1 to 6 while O.P. No. 95-(*a*) of 1948 was directed against the 7th respondent. The petitions were disposed of by an order of the District Judge dated 18th July, 1950 holding that lands covered by the pattas were forest lands and all the alienations were void and inoperative. A Civil Revision Petition was filed in the High Court of Madras by respondents 1 to 5 against the order of the District Judge. This was numbered as C.R.P. No. 22 of 1951. Respondent No. 7 filed a Miscellaneous Petition No. 9534 of 1950 in the High Court of Madras. By order dated 6th August, 1962 both the petitions were dismissed by a single Judge of the Madras High Court. This order was however set aside in a Letters Patent Appeal filed by respondents 1 to 5 (No. 261 of 1952) wherein it was held that the petitioners as ryots had no right to maintain the petition but reasonable opportunity should be given to the State to get transposed as the petitioner. The State Government thereafter got itself transposed as the petitioner. The District Court however held that the petition was not maintainable by reason of the repeal of the Act by reason of the passing of a subsequent Act (XXVI of 1948) styled the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, hereinafter referred to as the Act of 1948. Against this the State Government filed a Revision Petition in the High Court of Andhra Pradesh numbering 1555 of 1955. The High Court held that the dismissal of the petition on the ground of repeal of the Act was improper and that the petition should be disposed of on the merits and remitted the matter to the District Judge. By a judgment dated 30th November, 1960 the District Judge allowed the petition negativing the contentions of the respondent but holding that the lands were forest lands and transfers thereof were void The appellant and others filed Civil Revision Petitions in the High Court of Andhra Pradesh which were disposed of and dismissed by a common judgment dated 24th August, 1965. Hence this appeal.

The points urged before us by learned Counsel for the appellant were: (1) The Act applied only to lands which were admittedly forest lands and the operation thereof could not be extended to lands in respect of which there was a dispute as to the nature thereof. It was argued that any such dispute could only be decided by the Settlement Officer and not by the District Judge. (2) The Act was a temporary Act and all proceedings thereunder came to an end with the repeal of the Act ; and (3) A notification by the State Government describing the land as forest land was an essential pre-requisites to the application of the Act.

The purpose of the Act was to prohibit the alienation of communal, forest and private lands in estates in the Province of Madras and the premable to the Act shows that it was enacted to prevent indiscriminate alienation of communal, forest and private lands in estates in the Province of Madras pending the enactment of legislation for acquiring the interests of landholders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the above preamble the Act became a temporary Act., the definition of 'forest land' is given in section 2 (*b*) of the Act reading :

> " 'Forest land' includes any waste land containing trees and shrubs pasture land and other class of land declared by the State Government to be forest land by notification in the Fort Samy. George Gazette ; "

Sub-section (1) of section 3 prohibited landholders from selling, mortgaging, converting into ryoti land, leasing or otherwise assigning or alienating any communal or forest land in an estate without the previous sanction of the District Collector, on or after the date on which the Ordinance which preceded the Act came into force, namely, the 27th June. 1947. Section 4 (1) provided that :

> " Any transaction of the nature prohibited by section 3 which took place, in the case of any communal or forest land, on or after the 31st day of October, 1939 . . . . shall be void and inoperative and shall not confer or take away, or be deemed to have conferred or taken away, any right whatever on or from any party to the transaction :
>
> * * * * *"

This sub-section had a proviso with several clauses. Our attention was drawn to clauses (*iii*), (*iv*) and (*v*) of the proviso out in our opinion one of these provisos was applicable to the facts of the case so as to exclude the operation of sub-section 1 of section 4 Under sub-section (3) of section 4.

> "If any dispute arises as to the validity of the claim of any person to any land under clauses (*i*) to (*v*) of the proviso to sub-section (1), it shall be open to such person or to any other persons interested in the transaction or to the State Government to apply to the District Judge of the district in which the land is situated, for a decision as to the validity of such claim."

Under sub-section (4) the District Judge to whom such application is made was to decide whether the claim to the land was valid or not after giving notice to all persons concerned and where the application was not made by the State Government, to the Government itself, and his decision was to be final. Madras Act (XXVI of 1948) was passed on 19th April, 1949 being an Act to provide for the repeal of the Permanent Settlement, the acquisition of the rights of landholders in permanently settled and certain other estates in the Province of Madras, and the introduction of ryotwari settlement in such estates. Apparently because of the preamble to the Act it was contended that with the enactment of the repeal of the Permanent Settlement by the Act of 1948 which also provided for the acquisition of the rights of landholders in permanently settled estates, the Act stood repealed. We fail to see how because of the preamble to the Act it can be said that it stood repealed by the enactment of the later Act unless there were express words to that effect or unless there was necessary implication. It does not stand to reason to hold that the alienation of large blocks of land which were rendered void under the Act became good by reason of the passing of the later Act. Our attention was drawn to section 63 of the later Act which provided that :

> " If any question arises whether any land in an estate is a forest or is situated in a forest, or as to the limits of a forest, it shall be determined by the Settlement Officer, subject to an appeal to the Director within such time as may be prescribed and also to revision by the Board of Revenue."

In terms the section was only prospective and it did not seek to impeach any transaction which was effected before the Act and was not applicable to transactions anterior

to the Act. In our opinion section 56 (1) of the later Act to which our attention was drawn by the learned Counsel does not fall for consideration in this case and the disputes covered by that section do not embrace the question before us.

Madras General Clauses Act (I of 1891), deals with the effect of repeals of statutes. Section 8 sub-section (*f*) thereof provides that :

> " Where any Act, to which this Chapter applies, repeals any other enactment, then the repeal shall not—
>
> (*a*) to (*c*) * * *
>
> (*f*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such fine, penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

This shows that even if there was a repeal any investigation started before the repeal would have to be continued and legal proceedings under the Act could be prosecuted as if the repealing Act had not been passed.

There is also no force in the contention that unless there was a notification under section 2 (*b*) of the Act declaring a particular land to be forest land, the applicability of the Act would be excluded. The definition of 'forest land' in that section is an inclusive one and shows that 'forest land' would include not only waste land containing trees, shrubs and pasture lands but also any other class of lands declared by Government to be forest land. This does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act.

Lastly, Counsel ontended that sub-section (1) of section 20 of the later Act as originally enacted applies to forest lands and therefore the later Act became applicable thereto. The original section was however substituted, for another by section 9 of the Madras Estates (Abolition and Conversion into Ryotwari) (Amendment) Act, 1956 which was to be deemed to have come into force on 19th April, 1949, being the date on which the Act of 1948 originally came into force. The section as it now stands did not confer any jurisdiction on the Settlement Officer to determine any question as to whether any land was forest land within the meaning of the Act and consequently the adjudication by the District Judge under sub-section (4) of section 4 was quite competent. Accordingly we dismiss the appeal, but do not think it necessary to make any order for costs relating thereto.

R.M. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—M. HIDAYATULLAH *Chief Justice.*, J. C. SHAH, V. RAMASWAMI, G.K. MITTER AND A.N. GROVER, JJ.

A.V.S. Narasimha Rao and others ... *Appellants**

v.

State of Andhra Pradesh and another ... *Respondents.*

Andhra Pradesh Non-Gazetted Officers' Association and others ... *Interveners.*

Public Employment (Requirement as to Residence) Act (XLIV of 1957), *section* 3 *and Andhra Pradesh Public Employment (Requirement as to Residence) Rules* (1959), *rule* 3—*Validity of.*

Constitution of India (1950), *Article* 16—*Scope.*

Interpretation of Statutes—Provision as exception to general rule—Construction.

Section 3 of the Public Employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telangana and rule 3 of the Andhra Pradesh Public

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* W. P. No 65 of 1969. 28th March, 1969.

Employment (Requirement as to Residence) Rules, 1959 are *ultra vires* the Constitution of India.

Under Article 16 of the Constitution, by the first clause equality of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. An exception is however made in clause (3) to cover cases where local sentiments have to be respected or to prevent an inroad from more advanced States into less developed States. Parliament is entitled to make law prescribing, in regard to a class or classes of employment, residence within a State or Union territory prior to such employment or appointment. But that clause refers to residence within the State in the sense of the whole State as the venue for residential qualification and not residence in districts, taluks, cities, towns or villages within the State. The words 'any requirement' in the clause cannot be read as to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State.

Clause (3) of Article 16 which is in the nature of an exception to the general rule-making every office or employment open and available to every citizen and offices or employment in one part of India open to citizens in all other parts of India. As such it should be construed in a narrow and strict manner and not in a wide and liberal way.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

S.V. Gupte, Senior Advocate, (*P.A. Choudhury* and *K. Rajendra Chaudhuri,* Advocates with him), for Petitioners.

M.C. Setalvad, Senior Advocate, and *P. Ramachandra Rao,* Advocate-General for the State of Andhra Pradesh, (*A. Raghuvir,* Government Pleader, Andhra Pradesh High Court and *A.V. Rangam,* Advocate with them), for Respondent No. 1.

M. C. Setalvad, Senior Advocate, (*R.N. Sachthey,* Advocate with him), for Respondent No. 2.

R.V. Pillai, H.S. Gururaj Rao and *Subodh Markandeya,* Advocates for Respondents Nos. 3 to 45.

Sardar Ali Khan and *P.N. Duda,* Advocates, and *J.B. Dadachanji,* Advocate of *M/s, J.B. Dadachanji and Co.,* for Respondent No. 46.

P.A. Chaudhury, K. Rajendra Chaudhuri and *C.S. Sreenivasa Rao,* Advocates, for Interveners.

The Judgment of the Court was delivered by

Hidayatullah, C.J.—The petitioners are persons employed in the ministerial services of the Andhra Pradesh Government. All of them were working in various offices located in the cities of Hyderabad and Secunderabad. On 19th January, 1969, leaders of all political parties in the Legislature of the Andhra Pradesh State appeared to have met and reached the decision that to implement what are called 'Telengana Safeguards', the following measures should be taken :

> "All non-domicile persons, who have been appointed either directly, by promotion or by transfer to posts reserved under the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959 for domiciles of Telengana region will be immediately relieved from service. The posts so rendered vacant will be filled by qualified candidates possessing domicile qualifications and in cases where such candidates are not available the posts shall be left unfilled till qualified domicile candidates become available. Action on the above lines will be taken immediately.
>
> All non-domicile employees so relieved shall be provided employment in the Andhra region without break in service and by creating supernumerary posts, if necessary."

The Government of Andhra Pradesh then passed on order [G.O. Ms. 36, G.A. (S.R.) Dept.] on 21st January, 1969, relieving before 28th February, 1969, all non-domicile persons appointed on or after 1st November, 1956 to certain categories of posts reserved for domiciles of Telengana under the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959. Names of such incumbents were to be shown in a *pro forma* and they were to be employed in the Andhra region without break in service by creating supernumerary posts, if necessary. These supernumerary posts were to be treated as temporary addition to the strength of the office concerned and were to be adjusted against future vacancies in corresponding posts as they arose. The action was based upon section 3 of the Public Employment (Requirement as to Residence) Act (XLIV of 1957), which was an Act of Parliament made in pursuance of clause (3) of Article 16 of the Constitution making special provision for requirement as to residence and brought into force on 21st March, 1959. Section 3 of the Act gave the power to make Rules in respect of certain classes of employment in certain areas. It provided :

"3. Power to make rules in respect of certain classes of public employmnent certain areas,—

(1) The Central Government may, by notification in the Official Gazette, make rules prescribing, in regard to appointments to—

(*a*) any subordinate service or post under the State Government of Andhra Pradesh, or

* * * * *

* * * * *

any requirement as to residence within the Telengana area or the said Union territory as the case may be, prior to such appointment.

(2) In this section,—

(*a*) * * * * *

* * * * *

(*b*) "Telengana area" comprises all the territories specified in sub-section (1) of section 3 of the State Reorganisation Act, 1956."

Under section 4 the Rules had to be laid before each House of Parliament for Preriod of not less than 30 days and Parliament could make such alterations as it liked. Under section 5 the Rules had a life of 5 years but by subsequent legislation the period was extended to 10 years. It is said that the period is to be extended by another 5 years. The Rules were made on 21st March, 1959. They are called the Andhra Pradesh Public Employment (Requirement as to Residence) Rules, 1959. Rule 3 provides :

"3. Requirement as a residence Prior to Appointment :

A person shall not be eligible for appointment to a post within the Telengana area under the State Government of Andhra Pradesh or to a post under a local authority (other than a cantonment board) in the said area unless—

(*i*) he has been continuously residing within the said area for a period of not less than fifteen years immediately preceeding the prescribed date ; and

(*ii*) he produces before the appointment authority concerned, if so required by it, a certificate of eligibility granted under these rules ;

Provided that in relation to posts in the secretariat Departments and the Offices of the Heads of Departments of the State Government of Andhra Pradesh situated in the cities of Hyderabad and Secunderabad, the requirement as to residence laid down in this rule shall apply to the filling of only the second vacancy in every unit of three vacancies which are to be filled by direct recruitment ;

Provided further that any period of temporary absence from the Telengana area for the purpose of prosecuting his studies or for undergoing medical treatment

or any period of such temporary absence not exceeding three months for any other reasons shall not be deemed to constitute a break in the continuity of such residence, but for purpose of calculating the said period of fifteen years any such period of temporary absence shall be excluded."

The petitioners were appointed between 27th December, 1956, and 4th July, 1968. They challenge the Act, the Rules and the proposed action as *ultra vires* the Constitution. Their case is that Article 16 (3) under which the Act and the Rules purport to be made has been misunderstood as conferring a power to make a law prescribing requirement as to residence in a part of a State. For this reason section 3 of the Act is challenged as *ultra vires* the Constitution.

Article 16 on which the Act, the Rules and the present action are all based, reads :

16. Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making, any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within the State or Union territory prior to such employment or appointment.

(4) * * * * *

(5) * * * * *"

The question is one of construction of this article, particularly of the first three clauses, to find out the ambit of the law-making power of Parliament. The first clause emphasises that there shall be in India equality of opportunity for all citizens in matters of employment or appointment to any office under the State. The word 'State ' here is to be understood in the extended sense given to it by the definition of that word in Article 12. The second clause then specifies a prohibition against discrimination only on the grounds of religion, race, sex, descent, place of birth, residence or any of them. The intention here is to make every office or employment open and available to every citizen, and *inter alia* to make offices or employment in one part of India open to citizens in all other parts of India. The third clause then makes an exception. This clause was amended by the Constitution (Seventh Amendment) Act, 1956. For the original words of the clause 'under any State specified in the First Schedule or any local or other authority within its territory any requirement as to residence within that State ', the present words from ' under the Government' to ' Union territory ' have been substituted. Nothing turns upon the amendment which seeks to apply the exception in the clause to Union territory and to remove ambiguity in language.

The clause thus enables Parliament to make a law in a special case prescribing any requirement as to residence within a State or Union territory prior to appointment, as a condition of employment in the State or Union territory. Under Article 35 (*a*) this power is conferred upon Parliament but is denied to the Legislatures of the States, notwithstanding anything in the Constitution, and under (*b*) any law in force immediately, before the commencement of the Constitution in respect to the matter shall subject to the terms thereof and subject to such adaptations that may be made under Article 372 is to continue in force until altered or repealed or amended by Parliament.

The legislative power to create residential qualification for employment is thus exclusively conferred on Parliament. Parliament can make any law which prescribes any requirement as to residence within the State or Union territory prior to employ-

ment or appointment to an office in that State or Union territory. Two questions arise here. Firstly, whether Parliament, while prescribing the requirement, may prescribe the requirement of residence in a particular part of the State; and, secondly, whether Parliament can delegate this function by making a declaration and leaving the details to be filled in by the rule making power of the Central or State Governments.

Mr. S. V. Gupte, for the petitioners, points out that the Constitution is speaking of State and Union territory. It has already made a declaration that no person shall be disqualified for any office in the territory of India, because of his residence in any particular part of India. The exception, therefore, must be viewed narrowly and not carried to excess by interpretation. The article speaks of residence in a State and means only that. If it chose to speak of residence in parts of State such as Districts, Taluqas, cities, towns, etc., more appropriate and specific language could have been used such as 'any requirement as to residence within that State or Union territory *or part of that State or Union territory.*' Having used the word State, the unit State is only meant and not any part thereof. Reference is made to the history of the drafting of the Article and the debates in the Constituent Assembly which bear out this contention.

On the other hand, Mr. Setalvad bases his argument on two things. He contends that the power is given to Parliament to make *any* law and, therefore, Parliament is supreme and can make any law on the subject as the article says. He very ingeniously shifts the emphasis to the words 'any requirement' and contends that the requirement may be as to residence in the State or any particular part of State.

The claim for supremacy of Parliament is misconceived. Parliament in this, as in other matters, is supreme only in so far as the Constitution makes it. Where the Constitution does not concede supremacy, Parliament must act within its appointed functions and not transgress them. What the Constitution says is a matter for construction of the language of the Constitution. Which is the proper construction of the two suggested ? By the first clause equlity of opportunity in employment or appointment to an office is guaranteed. By the second clause, there can be no discrimination, among other things, on the ground of residence. Realising, however, that sometimes local sentiments may be have to be respected or sometimes an inroad from more advanced States into less developed States may have to be prevented and a residential qualification may, therefore, have to be prescribed, the exception in clause (3) was made. Even so, that clause spoke of residence within the State. The claim of Mr. Setalvad that Parliament can make a provision regarding residence in any particular part of a State would render the general prohibition lose all its meaning. The words 'any requirement' cannot be read to warrant something which could have been said more specifically. These words bear upon the kind of residence or its duration rather than its location within the State. We accept the argument of Mr. Gupte that the Constitution, as it stands, speaks of a whole State as the venue for residential qualification and it is impossible to think that the Constituent Assembly was thinking of residence in Districts, Taluqas, cities, towns or villages. The fact that this clause is an exception and came as an amendment must dictate that a narrow construction upon the exception should be placed as indeed the debates in the Constituent Assembly also seem to indicate. We accordingly reject the contention of Mr. Setalvad seeking to put a very wide and liberal construction upon the words 'any law' and 'any requirement.' These words are obviously controlled by the words 'residence within the State or Union territory' which words mean what they say, neither more nor less. It follows, therefore, that section 3 of the Public employment (Requirement as to Residence) Act, 1957, in so far as it relates to Telangana (and we say nothing about the other parts) and rule 3 of the Rules under it are *ultra vires* the Constitution.

In view of our conclusion on this point it is not necessary to express any opinion whether delegation to the Central and/or State Governments to provide by rules for the further implementing of the law made by Parliament is valid or not.

It was argued that the *Mulki Rules* existing in the former Hyderabad State must continue to operate by virtue of Article 35 (*b*) in this area. This point is not raised by the petitions under consideration and no expression of opinion by us is desirable.

For the reasons given above we quash the orders passed and declare section 3 of the Public Employment (Requirement as to Residence) Act, 1957 as also rule 3 of the Rules *ultra vires* the Constitution. The petitions shall be allowed but there shall be no order about costs.

R.M. ——— *Petitions allowed.*

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—J.C. SHAH, V. RAMASWAMI AND A.N. GROVER, JJ.

Digyadarsan Rajendra Ramdassji Varu ... *Appellant**

v.

State of Andhra Pradesh and another ... *Respondents.*

Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (XVII of 1966), *sections* 46 *and* 47—*Whether violative of Articles* 14, 19 (1) (*f*), 25 *and* 26 *of the Constitution of India.*

It is not possible to see how a procedural change of this nature can be regarded as contravening either Article 19 (1) (*f*) of Article 14 of the Constitution. The procedure which has been laid down makes all of the proceedings before the Commissioner·quasi-judicial. This is particularly so where the provisions of section 104 of the Act are kept in view. Moreover if any order of removal is made that can be challenged in a Court of law and there is a further right of appeal to the High Court.

There can be little or no doubt that if a mathadhipathi is of an unsound mind or suffers from any physical or mental defect or infirmity or has ceased to profess Hindu religion or the tenets of the math or if his case falls within clauses (*d*) to (*h*) of section 46 (1), his removable would be in the interest of the general public. A mathadhipathi cannot possibly perform his duties either as a spiritual or a temporal head nor can be properly administer or manage the trust property if he falls within the categories mentioned in clauses (*a*) to (*d*) or has been guilty of breach of trust or wilful default, etc. or leads an immoral life. Even under the Civil Procedure Code, his removal could have been ordered in proceedings under section 92 for similar reasons.

The suspension of a mathadhipathi, during the inquiry, is a necessary and reasonable part of the procedure which has been prescribed by section 46. If he is allowed to function during the pendency of an inquiry the entire purpose of the enquiry would be defeated. The mathadhipathi, may, during the pendency of the inquiry, do away with most of the evidence or transfer with books of account or otherwise commit acts of misappropriation and defalcation in respect of the properties of the math. It is essential, therefore, in those circumstances to make a provision for suspending him till the inquiry concludes and an order is made either exonorating minor directing his removal.

(*held*, section 46 not violative of Article 19 (1) (*f*) of the Constitution).

It has nowhere been established that the petitioner has been prohibited or debarred from professing, practising and propagating his religion. A good deal of material has been placed on record to show that the entire math is being guarded by the police constables but that does not mean that the petitioner cannot be allowed to enter the math premises and exercise the fundamental right conferred by Article 25 (1) of the Constitution.

* W.P. No. 347 of 1968. 26th March, 1969.

As regards the contravention of clauses (*b*) and (*d*) of Article 26 there is nothing in sections 46 and 47 which empowers the Commissioner to interfere with the autonomy of the religions denomination in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion the denomination professes or practises nor has it been shown that any such order has been made by the Commissioner or that the Assistant Commissioner who has been put in charge of the day to day affairs is interferring in such matters. Section 47 of the Act deals only with a situation where there is a temporary vacancy in the office after mathadhipathi by reason of any dispute in regard to the right of succession to the office or the reasons stated therein as also because the mathadhipathi has been suspended pending an inquiry under section 46. Its provisions do not take away the right of administration from the hands of a religious denomination altogether and vest is for all times in a person or authority who is not entitled to exercise that right under the customary rule and custom prevailing in the math.

Held, it cannot be said that section 47 would be hit by Article 26 (*d*) of the Constitution as the powers under it will be exercised, *inter alia* when mismanagement of property or maladministration of trust funds are involved.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamental Rights.

Kanak Ghosh and *B. Datta*, Advocates, for Appellant.

P. Ram Reddy, Senior Advocate, (*A.V.V. Nair* and *P. Parameshwar Rao*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Grover, J.—This is a petition under Article 32 of the Constitution challenging, *inter alia*, the constitutionality of sections 46 and 47 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (XVII of 1966), hereinafter called the " Act " and for issuance of a writ in the nature of *mandamus* or other appropriate writs and directions to the Commissioner of Hindu Religious and Charitable Endowments, hereinafter called the "Commissioner" prohibiting him from exercising his powers or taking action under the aforesaid sections.

The petitioner claims to be the Mathadhipathi of Shri Swami Hathiramji Math Tripathi-Thirumalla in the State of Andhra Pradesh. It is stated that this instituction was founded several centuries ago and is one of the renowned Maths in India. Hundreds of Sadhus visit the Math throughout the year and it is the duty of the Mahant as its religious head to provide the visiting Sadhus with food and shelter and for perform all religious duties with regard to the celebration of Hindu festivals, propagation of the cult of Shri Swami Hathiramji and performance of other religious functions. It is alleged that Mahant Chottandoss, the previous incumbent died on 18th March, 1962. On 24th March, 1962 the Commissioner took charge of the Math and its properties under sction 53 of the Andhra Pradesh (Andhra Areas) Hindu Religious and Charitable Endowments Act (XIX of 1951), hereinafter referred to as the " Repealed Act ". The petitioner filed a suit on 26th March, 1962, in the Court of the Subordinate Judge, Chittoor for a declaration that he was the rightful successor. The Commissioner was impleaded as a party to the suit. He also filed a revisional application under section 92 of the Repealed Act to the State Government. The Government disposed of the revisional application on 5th June, 1962. It appointed the petitioner as the interim Mahant subject to certain conditions which need not be mentioned. Before this order was made the petitioner withdrew the suit filed by him in April, 1962. Devendradoss, who was another claimant but who was a minor, filed a writ petition in the High Court challenging the above order of the Government but the same was rejected by the division Bench. Devendradoss then filed certain suits for a declaration of his title. On 22nd August, 1964, the Commissioner made an order directing the petitioner to show cause why the previous order appointing him as an interim Mahant be not recalled. According to the petitioner this was done because the State Government

started claiming, contrary to the rule and custom which prevailed in the Math, that the amounts received on account of *Padakanukus* (personal offerings) should be paid to the Government and not taken by the Mahant. This order was challenged by the petitioner by means of a writ petition in the High Court. The High Court issued a stay order which was later on clarified to mean that the State Government was free to take such further action under the Act as it considered necessary. On 9th September, 1965, the State Government framed charges against the petitioner and directed him to furnish his explanation. The petitioner was placed under suspension with immediate effect. It was further directed that the Assistant Commissioner, Tirupathi should take charge of the Math and its affairs. Meanwhile another claimant Bhagwandoss filed a suit on 29th September, 1965, claiming title to the *gaddi* in his own right. The writ petition which had been filed by the petitioner was allowed by the High Court on 8th November, 1966. The matter ultimately came up in appeal to this Court, the judgment being reported in *Secretary, Home (Endowments) Andhra Pradesh* v. *Digyadarsan Rajindra Ram Dasji*[1]. The judgment of the High Court was affirmed. The High Court had held that the petitioner had succeeded to the office of the Mahant on the death of Chetandoss on 18th March, 1962, in his own right. This Court concurred in that view and observed that the mere circumstance that the Government had also passed an order appointing him as the interim Mahant could not take away his right to function as a trustee on the basis of his original right. It followed that the Government had no jurisdiction to pass an order placing him under suspension as that virtually amounted to a removal of the trustee of the Math which could only be done in the manner provided by section 52 of the Repealed Act.

The Act received the assent of the President on 6th December, 1966, and was enforced with effect from 27th January, 1967. On 30th May, 1967, the petitioner filed a petition under Article 226 of the Constitution in the High Court for declaring the present impugned provisions of the Act as *ultra vires*. The petition was dismissed *in limine* as premature. An appeal to the Letters Patent bench failed. On coming to know that certain orders were going to be passed against the petitioner whereby charges on various matters were to be preferred and an inquiry made and that the suspension of the petitioner from Mahantship was going to be ordered, the present petition was filed under Article 32 of the Constitution in October, 1968. In this petition, apart from challenging the provisions of the Act a case of *mala fide* action has been sought to be made out against the respondent. In the order which was made by the Government on 18th November, 1968, as many as 14 charges have been preferred against the petitioner and his suspension as been duly ordered. The Assistant Commissioner Endowments Department has been directed to attend to the day-to-day administration of the Math temporarily and its Endowments until the disposal of the inquiry.

Now the Act has been enacted to consolidate and amend the law relating to the administration and governance of charitable and Hindu religious institutions and endowments in the State of Andhra Pradesh. Chapter I contains the definitions of various expressions used in the Act including the word "Commissioner" Chapter II provides for the appointment of Commissioner Joint Commissioners, etc., and give their powers and functions. Chapter III deals with administration and management of charitable and Hindu religious institutions and endowments. Chapter IV provides for registration of such institutions and endowments. Section 42 in Chapter V defines the word "*mathadhipathi*" to mean any person whether known as Mahant or by any other name, in whom the administration of a Math or specific endowment attached to a math are vested. Sections 46 and 47 are in the following terms :

"46. (1) The Commissioner may *suo motu* or on an application of two or more persons having interest, initiate proceedings for removing a mathadhipathi or a trustee of a specific endowment attached to a Math, if he—

1. (1968) 1 S.C.J. 627 : (1968) 1 M.L.J. (S.C.) 94 : (1968) 1 An. W.R. (S.C.) 94 : (1967) 3 S.C.R. 891.

(*a*) is of unsound mind ;

(*b*) is suffering from any physical or mental defect or infirmity which renders him unfit to be a mathadhipathi, or such trustee ;

(*c*) has ceased to profess the Hindu religion or the tenets of the math ;

(*d*) has been sentenced for any offence involving moral turpitude, such sentence not having been reversed;

(*e*) is guilty of breach of trust or misappropriation in respect of any of the properties of the math ;

(*f*) commits persistent and wilful default in the exercise of his powers or performance of his functions under this Act.

(*g*) violates any of the restrictions imposed or practices enjoined by the custom, usage or the tenets of the math, in relation to his personal conduct, such as celibacy, renundiation and the like ;

(*h*) leads an immoral life.

(2) The Commissioner shall frame a charge on any of the grounds specified in sub-section (1) against the *mathadhipathi* or trustee concerned and give him an opportunity of meeting such charge, of testing the evidence adduced and of adducing evidence in his favour. After considering the evidence adduced and other material before him, the Commissioner may, by order exonerate the *mathadhipathi* or trustee, or remove him. Every such order shall state the charge framed against the *mathadhipathi* or the trustee, his explanation and the finding on such charge together with the reasons therefor :

Provided that in the case of a math or specific endowment attached thereto whose annual income exceeds rupees one lakh, the order of removal passed by the Commissioner against the *mathadhipathi* or trustee shall not like effect unless it is confirmed by the Government.

(3) Pending the passing of an order under sub-section (2) the Commissioner may suspend the *mathadhipathi* or the trustee.

(4) (*a*) Any *mathadhipathi* or trustee aggrieved by an order passed by the Commissioner under sub-section (2) may, within ninety days from the date of receipt of such order, institute a suit in the Court against such order.

(*b*) An appeal shall lie to the High Court within ninety days from the date of a decree or order of the Court in such suit.

47. (1) Where a temporary vacancy occurs in the office of the *mathadhipathi* and there is dispute in regard to the right of succession to such office ; or where the mathadhipathi is a minor and has no guardian fit and willing to act as guardian, or where the *mathadhipathi* is under suspension under sub-section (3) of section 46, the Commissioner shall, if he is satisfied after making an inquiry in this behalf that an arrangement for the administration of the math and its endowments of the specific endowments, as the case may be, is necessary, make such arrangement as he thinks fit until the disability of the *mathadhipathi* ceases or another *mathadhipathi* succeeds to the office, as the case may be.

(2) In making any such arrangement, the Commissioner shall have due regard to the claims, if any, of the disciples of the math.

(3) * * * * * "

Section 83 confers powers on the Government to call for and examine the record of the Commissioner............in respect of any proceedings not being a proceeding in respect of which a suit or any appeal or application or reference to a Court is provided by the Act, to satisfy themselves as to the regularity of such proceedings or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to the Government that such decision or order should be modified, annulled, reversed or remitted for consideration they may pass

orders accordingly. Under section 104 where a Commissioner............makes an inquiry or hears an appeal under the Act, the inquiry has to be made and the appeal has to be heard as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure Code, 1908, to the trial of suits or the hearing of appeals and the provisions of the Indian Evidence Act and the Indian Oaths Act have also been made applicable.

Learned Counsel for the petitioner has assailed the constitutionality of section 46 although he has sought to read section 47 along with it so as to establish that the combined effect of the provisions contained in both the sections would be hit by Articles 14, 19 (1) (*f*), 25, 26 and 31 of the Constituion. Before the submissions, which have been made, are examined reference may be made to *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shrïur Math*[1] in which the constitutionality of various provisions of the repealed Act was challenged. That case related to the Shirur Math which was one of the 8 maths situate at Udipi in the district of South Kanara. The Hindu Religious Endowments Boards functioning under the Madras Hindu Religious Endowments Act, 1927 had taken action to frame a scheme for the administration of the affairs of the math. The challenge in the Courts was confined to the constitutional validity of the repealed Act. B. K. Mukherjea, J., (as he then was) dealt exhaustively with the rights of a Mahant to hold office as well as enjoy the property of the institution. The following observations as pages 1019, 1020 are noteworthy :

> " As said above, the ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant and the Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties would be to destroy his character as a Mahant altogether. It is true that the beneficial interest which he enjoys is appurtenant to his duties and as he is in charge of a public institution, reasonable restrictions can always be placed upon his rights in the interest of the public . But the restrictions would cease to be reasonable if they are calculated to make him unfit to discharge the duties which he is called upon to discharge. A Mahant's duty is not simply to manage the temporalities of a Math. He is the head and superior of spritual fraternity and the purpose of Math is to encourage and foster spiritual training by maintenance of a competent of teachers who could impart religious instructions to the disciples and followers of the Math and by try to strengthen the doctrines of the particular school or order, of which they profess to be adherents. This purpose cannot be served if the restrictions are such as would bring the *mathadhipathi* down to the level of a servant under the State department. It is from this standpoint that the reasonableness of the restrictions should be judged."

It was held that the Mahant was entitled to claim the protection of Article 19 (1) (*f*). The same Shirur Math figured in another case which came up to this Court and the decision in which is reported in *H. H. Sudhundra Thirtha Swamiar* v. *Commissioner for Hindu Religious and Charitable Endowments, Mysore*[2]. There the constitutionality of section 52 (1) (*f*) of the repealed Act, as amended, was unsuccessfully assailed. The scheme of that section was similar to section 92 of the Code of Civil Procedure. The Commissioner or any two or more persons having interest or having obtained the consent in writing of the Commissioner could institute a suit in the Court to obtain a decree for removing a trustee of a math or a specific endowment attached to a math for any one or more reasons given in clauses (*a*) to (*f*) which were similar to clauses (*a*) to (*f*) of sub-section (1) of section 46 of the Act Whereas previously the Commissioner could only institute a suit in a Court, he has now been empowered under the Act by section 46 to initiate proceedings himself for removing a *mathadipathi* on the grounds mentioned in clauses (*a*) to (*h*). Clauses

1. (1954) S.C.J. 335 : (1954) 1 M.L.J. 596 : (1954) S.C.R. 1005.
2. (1964) 2 S.C.J. 287 : (1963) 2 S.C.R. (Supp.) 302

(*g*) and (*h*) are new and sub-section (2) gives the procedure for making the inquiry. If the *mathadhipathi* is aggrieved by the order made by the Commissioner, he has been given the right to institute a suit against such order in the Court by sub-section (4). The difference, in other words, is that previously the removal could be ordered only by the Court but under section 46 of the Commissioner can order the removal after following the procedure laid down and his order is final except that it can be challenged by means of a suit by the *mathadhipathi*. It also requires confirmation by the Government where the annual income of the math exceeds rupees one lakh. An additional power has been conferred on the Commissioner by sub-section (3) to suspend the *mathadhipathi* pending the passing of an order under sub-section (2).

The view which was taken in the above case was that section 52 (1) (*f*) of the repealed Act did not in effect seek to cut down the authority of the Mahant which was traditionally recognized and that the said provision which authorised the institution of a suit for removal of a Mahant where he was found to have wasted the property of the math or applied such funds or property for purposes wholly unconnected with the institution did not amount to an unreasonable restriction upon the exercise of the rights of the Mahant. On behalf of the petitioner a strenuous attempt has been made to show that section 46 of the Act is quite different from its counterpart contained in the repealed Act, namely, section 52 and that the powers which have been conferred are clearly violative of the fundamental right to hold the office of the Mahant as also the property of the math. In *H. H. Sudhundra Thirtha Swamiar's case*[1] it has been emphaised that the Mahant by virtue of his office is under an obligation to discharge the duties as a trustee and is answerable as such. He enjoys large powers for the benefit of the institution of which he is the head. He is to incur expenditure for the math *i.e.*, for carrying on the religious worship for the disciples and for maintaining the dignity of his office but the property is attached to the office and the Mahant cannot incur expenditure for personal luxury or objects incongruous with his position as a Mahant. Keeping all this in view it is difficult to see how the provisions of section 46 would be violative of Article 19 (1) (*f*) of the Constitution. The grounds on which his removal as *mathadhipathi* can be ordered have been specifically provided and no exception has been or can be taken to them. The main attack is based on the power given to the Commissioner instead of the Court to make an inquiry into or try the allegations or charges against the Mahant and order his removal if such charges are established. It is not possible to see how a procedural change of this nature can be regarded as contravening either Article 19 (1)(*f*) or Article 14 of the Constitution which is the other Article which has been pressed into service. The procedure which has been laid down makes all the proceedings before the Commissioner quasi-judicial. This is particularly so when the provisions of section 104 of the Act are kept in view. Moreover if any order of removal is made that can be challenged in a Court of law and there is a further right of appeal to the High Court. Learned Counsel for the petitioner had finally to build his argument on the provisions of sub-section (3) which give power to the Commissioner to suspend the *mathadhipathi* during the pendency of an inquiry and before any order in the matter of removal is made. It is pointed out that such suspension would seriously interfere with the numerous duties which a *mathadhipurthi* has to perform as the head of a spiritual fraternity. The petitioner, in this manner, has been debarred from not only managing the institution but also from carrying out the essential work which according to the tenets and custom of the fraternity he is under an obligation to do. For instance he cannot look after the Sadhus and other disciple who constantly visit the math and come for religious instruction there nor can he preside over religious functions and other periodical festivities which are held in the seat of math. Thus, it is urged, that there is a clear violation of Article 19 (1) (*f*) which guarantees the petitioner's right to hold and enjoy the property, apart from the interference with his right to practice and propagate religion and manage the affairs of the math in matters of religion which rights are guaranteed by Articles 25 and 26 of the Constitution.

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1. (1964) 2 S.C.J. 287 : (1963) 2 S.C.R. (Supp.) 302.

As regards Article 19 (1) (*f*) it has to be seen whether the restrictions which have been imposed by the impugned provisions of the Act are reasonable and are in the interest of the general public. There can be little or no doubt that if a *mathadhipathi* is of an unsound mind or suffers from any physical or mental defect or infirmity or has ceased to profess Hindu religion or the tenets of the math or if his case falls within clauses (*d*) to (*h*) of section 46 (1) his removal would be in the interest of the general public. A *mathadhipathi* cannot possibly perform his duties either as a spiritual or a temporal head nor can be properly administer or manage the trust property if he falls within the categories mentioned in clauses (*a*) to (*d*) or has been guilty of breach of trust or wilful default etc. or leads an immoral life [*vide* clauses (*e*) to (*h*) of section 46 (1)]. Even under the Civil Procedure Code, his removal could have been ordered in proceedings under section 92 for similar reasons.

The suspension of a *mathadhipathi*, during the inquiry, is a necessary and reasonable part of the procedure which has been prescribed by section 46. If he is allowed to function during the pendency of an inqiry the entire purpose of the enquiry might be defeated. The *mathadhipathi* may, during the pendency of the inquiry, do away with most of the evidence or tamper with the books of account or otherwise commit acts of misappropriation and defalcation in respect of the properties of the math. It is essential, therefore, in these circumstances to make a provision for suspending him till the inquiry concludes and an order is made either exonerating him or directing his removal.

On the question whether sections 46 and 47 of the Act contravene Articles 25 and 26, a good deal of reliance has been placed on the observations in the first *Shirur Math case*[1], Mukherjea, J., (as he then was) delivering the judgment of the Court had examined the scope of the language of Articles 25 and 26. It was indicated by him that freedom of religion in our constitution is not confined to religious beliefs only; it extends to religious practice as well subject to the restrictions which the Constitution itself has laid down. Under Article 26 (*b*) therefore, a religious denomination or organisation enjoys complete automony in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion and no outside authority has any jurisdiction to interfere with its decision in such matters. Moreover under Article 26 (*d*) it is the fundamental right of a religious denomination or its representative to administer its property in accordance with law; and the law, therefore, must leave the right of administration to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. It was further laid down that a law which takes away the right of administration from the hands of a religious denomination altogether and vests it in any other authority would amount to a violation of the right guaranteed under clause (*d*) of Article 26. Now under section 47 of the Act where a *mathadhipathi* is under suspension the Commissioner can make such arrangement as he thinks fit for the administration of the math until another *mathadhipathi* succeeds to the office and in making such arrangement has to have due regard to the claims of the disciples of the math. It is maintained on behalf of the petitioner that the appointment of Assistant Commissioner, Endowments Department, Tirupathi as the day-to-day administrator of the math and its endowment as a two fold effect. The first is that the complete autonomy which a religious denomination like the math in question enjoys in the matter of observance of rights and ceremonies essential to the tenets of the religion has been interfered with. The second is that the right of administration has been altogether taken away from the hands of the religious denomination by vesting it in the Assistant Commissioner. This clearly contravenes the provisions of clauses (*b*) and (*d*) of Article 26 within the rule laid down in the first *Shirur Math case*[1]. By doing so in exercise of the powers under section 47 the Commissioner has also debarred the petitioner from practising and propagating religion freely which he is entitled to do under Article 25 (1).

The attack on the ground of violation of Article 25 (1) can be disposed of quite briefly. It has nowhere been established that the petitioner has been prohibited or debarred from professing, practising and propagating his religion. A good dale

1. 1954 S.C.J. 335: (1954) 1 M.L.J. 596: (1954) S.C.R. 1005.

of material has been placed on the record to show that the entire math is being guarded by police constables but that does not mean that the petitioner cannot be allowed to enter the math premises and exercise the fundamental right conferred by Article 25 (1) of the Constitution. As regards the contravention of clauses (*b*) and (*d*) of Article 26 there is nothing in sections 46 and 47 which empowers the Commissioner to interfere with the autonomy of the religious denomination in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion the denomination professes or practises nor has it been shown that any such order has been made by the Commissioner or that the Assistant Commissioner who has been put in charge of the day-to-day affairs is interfering in such matters. Section 47 of the Act deals only with a situation where there is a temporary vacancy in the office of the *mathadhipathi* by reason of any dispute in regard to the right of succession to the office or the other reasons stated therein as also because the *mathadhipathi* has been suspended pending an inquiry under section 46. Its provisions do not take away the right of administration from the hands of a religious denomination altogether and vest it for all times in a person or authority who is not entitled to exercise that right under the customary rule and custom prevailing in the math. In the first *Shirur Math case*[1], section 56 of the repealed Act before its amendment by Act XII of 1954 was struck down as power had been given to the Commissioner to require the trustee to appoint a manager for the administration of the secular affairs of the institution and the Commissioner himself could also make the appointment. It was pointed out that this power could be exercised at the mere option of the Commissioner without any justifying necessity whatsoever and no pre-requisites like mismanagement of property or maladministration of trust funds were necessary to enable the trustee to exercise such drastic power. The effect of the section really was that the commissioner was at liberty, at any moment, to deprive the Mahant of his right to administer the trust property even if there was no negligence or maladministration on his part. Such a restriction was held to be opposed to the provisions of Article 26 (*d*) of the Constitution. Section 47 of the Act is not *in pari materia* with section 56 of the repealed Act. On the contrary section 47 indicates quite clearly the conditions and situations in which the Commissioner can appoint someone to carry on the administration of the math and its endowments. In the present case, the Assistant Commissioner has been appointed as a day-to-day administrator because of the inquiry which is pending against the petitioner and in which serious charges of misappropriation and defalcation of trust funds and leading an immoral life are being investigated. It cannot be said that section 47 would be hit by Article 26 (*d*) of the Constitution as the powers under it will be exercised, *inter alia*, when mis-management of property or maladministration of trust funds are involved.

Counsel for the petitioner has not made any serious attempt to argue that in the view that we are inclined to take there would be any contravention of Article 31 (1) of the Constitution. He has, however, pressed for the petitioner being allowed to take the *Padakanulas* which are receivable by the Mahant of which he will keep an account as was directed by this Court when disposing of the stay petition on 13th December, 1968. Counsel for the respondent agrees to this and has also agreed to keep accounts of whatever amount is spent on feeding the sadhus and on the management of the math property. He has further given an undertaking that the inquiry which is being conducted under section 46 of the Act will be concluded within a period of three months. It may be made clear that the Assistant Commissioner who is in charge of the day-to-day administration temporarily of the math and its endowments shall be fully entitled to take necessary steps for recovery of all debts and claims which could have been recovered by the Mahant from various debtors etc.

The writ petition, however, fails and it is dismissed, but in view of the entire circumstances we make no order as to costs.

S.V.J. —— *Petition dismissed.*

1. (1954) S.C.J. 335 : (1954) 1 M.L.J. 596 : (1954) S.C.R. 1005.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

Workmen of the Indian Leaf Tobacco Development Co. Ltd., Guntur .. *Appellants**

v.

The Management of Indian Leaf Tobacco Development Co. Ltd., Guntur .. *Respondent.*

Labour Law—Closure of business of the company, genuine and real—Stoppage of part of a business (closure of 8 depots by the Company), if could be interfered with by an Industrial Tribunal—Closure entirely in the discretion of the company.

Labour Law—Closure of part of business of the company—Closure genuine and real to effect economy and secure quality—Discharge of workmen on payment of retrenchment compensation—Tribunal, if could ask the company to reinstate the workmen.

The closure of the 8 depots by the respondent—company, even if it is held not to amount to closure of business of the company, cannot be interfered with by an Industrial Tribunal if, in fact, that closure was genuine and real. The closure many be treated as stoppage of part of the activity or business of the company. Such stoppage of part of a business is an act of management which is entirely in the discretion of the company carrying on the business. No Industrial Tribunal, even in a reference under section 10 (1) (*d*) of the Industrial Disputes Act, can interfere with the discretion exercised in such a matter and can have any power to direct a company to continue a part of the business which the company has decided to shut down. A Tribunal under the Industrial Disputes Act has no power to issue orders directing a company to re-open a closed depot or branch, if the company, in fact, closes it down.

After examining the evidence, the Tribunal came to the conclusion that the stoppage of the work at the depots was genuine and that the work which was being carried on at the depots had not been transferred to the buying points established by the Company. The closure of the business at the depots was necessitated by reasons of expediency inasmuch as the company had to reduce its purchases in its quest for quality and its desire to run the business economically. The principal work which used to be done at the depots, was not that of purchasing tobacco, but of handling it and that work was not transferred at all to any buying point. The Tribunal, thus came to the finding that the closure of there depots was real and genuine. The suggestion that only, a device was adopted of carrying on the same business in a different manner had no force at all. If the same business had been continued, though under a different guise, the claim of the workmen not to be retrenched could possibly be considered by the Tribunal, but, on the finding that there was a genuine closure of the business that used to be carried on at the depots, no question could arise of retrenchment being set aside by the Tribunal. The Tribunal could not ask the company to re-employ or reinstate the workmen, because there was no business for which the workmen could be required.

Appeal by Special Leave from the Order dated the 13th August, 1964 of the Industrial Tribunal, Andhra Pradesh in Industrial Dispute No. 41 of 1963.

M. K. Ramamurthi, Mrs. Shyamala Pappu and *Mr. Vineet Kumar,* Advocates, for Appellants.

K. Srinivasamurthy and *Naunit Lal,* Advocates, for Respondent.

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* C.A. No. 556 of 1966. 27th September, 1968.

The Judgment of the Court was delivered by

Bhargava, J.—This appeal, by Special Leave, has arisen out of an award made by the Industrial Tribunal, Andhra Pradesh, at Hyderabad in an Industrial dispute between the respondent, the Indian Leaf Tobacco Development Company Limited, Guntur (hereinafter referred to as " the Company "), and its workmen. Admittedly, the Company is an associate of the Imperial Tobacco Company Ltd. and the main business carried on by the Company is that of purchasing tobacco of all varieties and qualities, stemming, grading and packing of tobacco and supplying it to the Imperial Tobacco Co., as well as exporting the tobacco to various foreign countries in the world. The Company has been carrying on this business for about 40 years and handles almost 35 per cent of the tobacco grown in the State of Andhra Pradesh. For the work of stemming, grading and packing tobacco the Company has two factories, one at Anaparty in East Godavary District, and the other at Chirala in Guntur District. In connection with this business, the Company, in the year 1962, was maintaining 21 depots where, according to the workmen, the appellants, the Company was carrying on the work of collecting tobacco, though the Company's case was that the principal work done at these depots was that of handling the tobacco purchased at other places and only included the work of purchasing tobacco on a small scale.

On 16th August, 1963, the Company gave a notice to the Union of the appellant workmen that 8 out of 21 depots mentioned therein would be closed down with effect from 30th September, 1963. Thereafter, an industrial dispute was raised by the workmen which related to the closure of these 8 depots, as well as to a number of other demands, including revision of basic wages and dearness allowance, additional discomfort allowance, etc. The State Government, by its order dated 14th November, 1963, referred the dispute for adjudication under section 10 (1) (*d*) of the Industrial Disputes Act, 1947 to the Industrial Tribunal, Hyderabad. The first issue, which was referred for adjudication, was as follows :—

> " How far the demands of the union, *viz.*, that no depot which worked during 1962 season should be closed, and (*ii*) that no workman who worked in 1962 season should be retrenched, are justified? "

There were ten other issues, but we need not reproduce them, as we are not concerned with them in this appeal.

In the proceedings for adjudication, the Company took a preliminary objection that the closure of the depots was a managerial function, that there could not be an industrial dispute over such closure, that the Government, therefore, had no power to refer this issue for adjudication, and that the Tribunal also had no power to adjudicate on it. Thereupon, the Tribunal framed a preliminary issue as to " whether the employer is justified in alleging that Issue No. 1 framed by the Government cannot be deemed related to an industrial dispute, and as such, whether the Government had the power to refer it for adjudication." The Tribunal decided this preliminary issue by giving an interim award on the 13th August, 1964. The preliminary objection was allowed and furher direction was made that the effect of this decision on Issue No. 1 will be decided later after hearing the parties. Thereafter, the Tribunal proceeded to hear the reference on this question as well as on all other issues referred to it and, ultimately, gave its award on 11th December, 1964. In that award, both the parts of issue No. 1 were decided against the workmen. The workmen have now come up in this appeal against the interim award, dated 13th August, 1964 as well as against the final award insofar as it relates to issue No. 1.

The decision given by the Tribunal in the interim award, holding that the reference covered by issue No. 1 was not competent, has been challenged by learned Counsel for the appellants on the ground that the closure of a depot does not amount to closure of business in law and, since the same business was continued by the Company at atleast 13 other depots, the closure of the 8 depots in question was unjustified

For the proposition that the closure of the depots did not amount to closure of business, learned Counsel relied on the views expressed by this Court in *Pipraich Sugar Mills Ltd.* v. *Pipraich Sugar Mills Mazdoor Union*[1], where the Court explained the reason for the decision given by the Labour Appellate Tribunal in the case of *Employees of Messrs. India Reconstruction Corporation Ltd., Calcutta* v. *Messrs. India Reconstruction Corporation Ltd., Calcutta*[2]. It, however, appears to us that this question raised on behalf of the appellants is totally immaterial insofar as the question of the jurisdiction of the Tribunal to decide the first part of issue No. 1 is concerned. The closure of the 8 depots by the Company, even if it is held not to amount to closure of business of the Company, cannot be interfered with by an Industrial Tribunal if, in fact, that closure was genuine and real. The closure may be treated as stoppage of part of the activity or buiness of the Company. Such stoppage of part of a business is an act of management which is entirely in the discretion of the Company carrying on the business. No Industrial Tribunal, even in a reference under section 10 (1) (*d*) of the Industrial Disputes Act, can interfere with discretion exercised in such a matter and can have any power to direct a Company to continue a part of the business which the Company has decided to shut down. We cannot possibly accept the submission made on behalf of the appellants that a Tribunal under the Industrial Disputes Act has power to issue orders directing a Company to reopen a closed depot or branch, if the Company, in fact, closes it down.

An example may be taken of a case where a Bank with its headquarters in one place and a number of branches at different places decides to close down one of the branches at one of those places where it is functioning. We cannot see how, in such a case, if the employees of that particular branch raise an industrial dispute, the Bank can be directed by the Industrial Tribunal to continue to run that branch. It is for the Bank to decide whether the business of the branch should be continued or not, and no Bank can be compelled to continue a branch which it considers undesirable to do.

In these circumstances, it is clear that the demand contained in the first part of Issue No. 1 was beyond the powers and jurisdiction of the Industrial Tribunal and was incorrectly referred for adjudication to it by the State Government.

Ofcourse, if a Company closes down a branch or a depot, the question can always arise as to the relief to which the workmen of that branch or depot are entitled and, if such a question arises and becomes the subject-matter of an industrial dispute, an Industrial Tribunal will be fully competent to adjudicate on it. It is unfortunate that, in this case, when dealing with the preliminary issue, the Tribunal expressed its decision in the interim award in general words, holding that Issue No. 1 as a whole was beyond its jurisdiction. If the reasoning in the interim award is taken into account, it is clear that the Tribunal on that reasoning only came to the conclusion that it was not competent to direct reopening of the 8 depots which had been closed, so that the Tribunal should have held that the first part of Issue No. 1 only was outside its jurisdiction.

So far as the second part of that issue is concerned, as we have said above, it was competent for the Tribunal to go into it and decide whether the claim of the workmen that they should not be retrenched was justified. On an examination of the interim award and the final award, we, however, find that the Tribunal in fact did do so. The case reported in *Pipraich Sugar Mills Ltd.*[1], was also concerned only with the question as to the relief that can be granted to workmen when there is closure of a business. No question arose either before the Court, or in the cases considered by the Court, of an Industrial Tribunal making a direction to the employers to continue to run or to reopen a closed branch of the business. The Labour

1. (1957) S.C.J. 38 : (1956) S.C.R. 872. 2. (1953) L.A.C. 563.

Appellate Tribunal in the case of *Employees of Messrs. India Reconstruction Corporation Ltd., Calcutta*[1], was dealing with the question of retrenchment compensation as a result of the closure of one of the units of the company concerned, and it held that the workmen were entitled to retrenchment compensation in accordance with law. This Court, in the case of *Pipraich Sugar Mills Ltd.*[2], only explained why the Labour Appellate Tribunal was justified in granting retrenchment compensation in that case. The opinion expressed by the Court was that, though there is discharge of workmen both when there is retrenchment and closure of business, the compensation is to be awarded under the law, not for discharge as such but for discharge on retrenchment, and if, as is conceded, retrenchment means in ordinary paralance discharge of the surplus, it cannot include discharge on closure of business. It was in this context that the Court went on to add that in the case of *Employees of M/s. India Reconstruction Corporation Ltd., Calcutta*[1], what had happened was that one of the units of the Company had been closed which would be a case of retrenchment and not a case of clsoure of business. It may be noted that, at the time when this decision was given, section 25-FF and section 25-FFF had not been introduced in the Industrial Disputes Act, and the only right to retrenchment compensation granted to the workmen was conferred by section 25-F. It was in the light of the law then prevailing that the Court felt that the decision of the Labour Appellate Tribunal in the case of *Employees of M/s. India Reconstruction Corporation Ltd.*[1], granting retrenchment compensation could be justified on the ground that the services of the workmen had not been dispensed with as a result of closure of business, but as a result of retrenchment. That question does not arise in the case before us. Since then, as we have indicated above, section 25-FF and section 25-FFF have been added in the Industrial Disputes Act, and the latter section specifically lays down what rights a workman has when an undertaking is closed down. In a case where a dispute may arise as to whether workmen discharged are entitled to compensation under section 25-F or section 25-FFF it may become necessary to decide whether the closure, as a result of which the services have been dispensed with, amounts to a closure in law or not. In the case before us, it was admitted by learned Counsel for both parties that the workmen, who have been discharged as a result of the clsoure of the 8 depots of the Company, have all been paid retrenchment compensation at the higher rate laid down in section 25-F, so that, in in this case, it is not necessary to decide the point raised on behalf of the workmen.

In connection with the second part of issue No. 1, it was also urged by learned Counsel for the appellants that the business, which was being carried on at the depots, had not in fact been closed down and had merely been transferred to buying points situated in and around the closed depots, including two new buying points established by the Company after the closure of these 8 depots. The argument was that the workmen were old employees who had served the Company for a long time and were entitled to certain benefits as a result of that long service. The Company closed these 8 depots *mala fide* with the object of depriving the workmen of those benefits and merely altered the nature of the business by closing the depots and carrying on the same business at the buying points. This point urdged by learned Counsel cannot, however, be accepted in view of the findings of fact recorded by the Tribunal.

The Tribunal examined in detail the allegations made on behalf of the workmen in this respect. In fact, the interim award mentions that, for the purpose of deciding the preliminary issue and the first issue, evidence was recorded by the Tribunal for more than a week and arguments of Advocates of the parties were heard for even a longer period. After examining the evidence, the Tribunal came to the conclusion that the stoppage of the work at the depots was genuine and that the work which was being carried on at the depots had not been transferred to the buying points established by the Company. The closure of the business at the depots was necessitated by reasons of expediency inasmuch as the Company had to reduce its purchases in its quest for quality and its desire to run the business economically. The principal

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1. (1953) L.A.C. 563.
2. (1957) S.C.J. 38 : (1956) S.C.R. 872.

work, which used to be done at the depots, was not that of purchasing tobacco, but of handling it and that work was not transferred at all to any buying point. The Tribunal, thus, came to the finding that the closure of these depots was real and genuine and that the suggestion of the appellants that only a device was adopted of carrying on the same business in a different manner had no force at all. If the same business had been continued, though under a different guise, the claim of the workmen not to be retrenched could possibly be considered by the Tribunal ; but, on the finding that there was a genuine closure of the business that used to be carried on at the depots, no question could arise of the retrenchment being set aside by the Tribunal. The Tribunal could not ask the Company to re-employ or reinstate the workmen, because there was no business for which the workmen could be required. In these circumstances all that the workmen could claim was compensation for loss of their service and in that respect, as we have indicated above, the workmen have received adequate compensation.

Consequently, the appeal has no force and is dismissed ; but we make no order as to costs.

V.M.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction.)

PRESENT :—J. C. SHAH AND A. N. GROVER, JJ.

The State of Andhra Pradesh .. *Appellant**

v.

Kokkiligada Meeraiah and another .. *Respondents.*

Criminal Law—Issue estoppel—Rule of—Application—Prevention of relitigation of the issue determined in a criminal trial between the State and the accused—A conclusion inconsistent with the conclusion at the earlier trial prohibited—Rejection of evidence to sustain an order for binding over the respondents to keep peace, if precludes a subsequent trial—Criminal Procedure Code (V of 1898), section 403.

Section 403 of the Code of Criminal Procedure enacts the rule of *autre fois acquit* and *autre fois convict* applicable to criminal trials. But the rule of issue estoppel in criminal trials evolved by the High Court of Australia and approved by the Judicial Committee has been applied to criminal trials in India, apart from the terms of section 403 of the Code of Criminal Procedure. The rule of issue estoppel prevents relitigation of the issue which has been determined in a criminal trial between the State and the accused. If in respect of an offence arising out of a transaction a trial has taken place and the accused has been acquitted, another trial in respect of the offence alleged to arise out of that transaction or of a related transaction which requires the Court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is prohibited by the rule of issue estoppel. In the present case, there was no trial and no acquittal. The rejection of evidence given in the earlier proceeding to sustain an order for binding over the respondents to keep the peace does not preclude the trial of the respondents in respect of the specific incident which together with the other incidents was sought to be made the basis of the order of binding over the respondents.

Appeal by Special Leave from the Judgment and Order dated the 17th April, 1967 of the Andhra Pradesh High Court in Criminal Revision Petition No. 735 of 1965.

P. Ram Reddy, Senior Advocate (*A. V. V. Nair*, Advocate, with him), for the Appellant.

G. S. Rama Rao, Advocate, for Respondents.

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* Crl. A. No. 207 of 1967. 28th November, 1968.

The Judgment of the Court was delivered by

Shah, J.—K. Meerayya, K. Venkatanarayana—respondents in this appeal—and two others were charged before the Judicial Magistrate, II Class, Avanigadda, for offences under sections 323 and 324 Indian Penal Code for voluntarily causing injuries to Seetharamayya and Veeraraghavayya on 22nd June, 1964. The trial Magistrate convicted Meerayya and Venkatanarayana—the first under the offence under section 324 and the second for the offence under section 323, Indian Penal Code. In appeal to the Court of Session, Krishna Division, at Machilipatnam, the order was confirmed. The High Court, in exercise of its revisional jurisdiction, set aside the order of conviction and sentence. The State of Andhra Pradesh has appealed to this Court, with Special Leave.

The case raises a question of some importance in the administration of justice. The findings recorded by the trial Magistrate and confirmed by the Sessions Judge were that the respondents had committed assault upon Seetharamayya and Veeraraghavayya and that they could in law be properly convicted. But it was urged that there was a bar against prosecution of the two accused Meerayya and Venkatanarayana because of the "principle of issue estoppel" The plea is raised on the ground that the Station House Officer, Kodur Police Station, had instituted proceedings in the Court of the Sub-Divisional Magistrate, Bandat, under section 107, Code of Criminal Procedure, against 96 persons, amongst whom were the two respondents, and an order under section 112, Code of Criminal Procedure was made stating that the persons named therein were indulging in acts of violence involving breach of public peace and tranquility in the village of Salempalan and were endangering peace in the village, and that they had formed themselves into a party and were thereby disturbing the public peace and tranquility by committing acts of violence, and on that account they were required to show cause why each person named should not execute a bond for keeping the peace for a period of one year in the sum of Rs. 1000 with two sureties in a like amount each. In the order requiring the parties to show cause, four incidents were referred to—the first of which is material. It was recited that on 22nd June, 1964, 11 persons including the two respondents had beaten Seetharamayya and Veeraragavayya with crowbars and sticks, and a case in Crime No. 20 of 1961 under sections 48, 323 and 325 Indian Penal Code had been registered and was being investigated. The Sub-Divisional Magistrate held an inquiry and was of the view that since the evidence led in support of the first incident was not supported by reliable evidence, and there were inherent discrepancies in the testimony of the witnesses and the recitals in the complaint, the first incident was not proved against any of the eleven persons.

It was urged that the order of the Sub-Divisional Magistrate holding that the respondents were not concerned in the incident had become final and it was not open to the Judicial Magistrate, II Class, Avanigadda, to hold a trial against the respondents in respect of the same incident. The Trial Magistrate rejected the plea, and the Session Judge agreed with him. But in the view of the High Court since in the proceeding under section 107 of the Code of Criminal Procedure the incident which was made the subject-matter of the complaint against the respondents in the Court of the Judicial Magistrate was one of the incidents relied upon and was held not proved, it was not open to the State to commence or continue a prosecution against the respondents in respect of the same incident. In so holding, the High Court held that on the principle of "issue estoppel" approved by this Court in *Manipur Administration* v. *Thokchom, Bira Singh*[1], so long as the finding, that the respondents were not concerned in the incident, was not set aside by appropriate proceeding, no prosecution or any allegation legally inconsistent with that finding could be commenced against the respondents.

Counsel for the State contended that the rule of issue estoppel is inconsistent with the statutory provisions contained in section 403 of the Code of Criminal

1. (1964) 7 S.C.R. 123 : 1965) M.L J. (Crl.) 233 : (1965) 1 S.C.J 451.

Procedure, and cannot be resorted to in criminal trials and that in any event the rule of issue estoppel had no application, since there was no "previous trial" of the respondents for any offence alleged to arise out of the incident in respect of which they were tried. It was urged that it was not the law even recognised by the Australian Courts where the rule of issue estoppel had its origin that evidence on which a criminal proceeding was held cannot be utilised in any subsequent proceeding between the same parties.

The first contention raised by Counsel for the State cannot be entertained in view of a large body of authority in this Court. If the matter were *res integra* the argument that the Courts cannot travel outside the terms of the Code of Criminal Procedure and extend the rule of *autre fois acquit* incorporated in section 403 of the Code of Criminal Procedure may have required serious consideration.

The following important rules emerge from the terms of section 403 of Code of Criminal Procedure:

(1) An order of conviction or acquittal in respect of any offence constituted by any act against or in favour of a person does not prohibit a trial for any other offence constituted by the same act which he may have committed, if the Court trying the first offence was incompetent to try that other offence.

(2) If in the course of a transaction several offences are committed for which separate charges could have been made, but if a person is tried in respect of some of those charges, and not all, and is acquitted or convicted, he may be tried for any distinct offence for which at the former trial a separate charge may have been but was not, made.

(3) If a person is convicted of any offence constituted by any act, and that act together with the consequences which resulted therefrom constitute a different offence, he may again be tried for that different offence arising out of the consequences, if the consequences had not happened or were not known to the Court to have happened, at the time when he was convicted.

(4) A person who has once been tried by a Court of competent jurisdiction for an offence and has been either convicted or acquited shall not be tried for the same offence or for any other offence arising out of the same facts, for which a different charge from the one made against him might have been made or for which he might have been convicted under the Code of Criminal Procedure.

Section 403 of the Code of Criminal Procedure enacts the rule of *autre fois acquit* and *autre fois convict* applicable to criminal trials. The rule is that so long as an order of acquittal or conviction at a trial held by a Court of competent jurisdiction of a person charged with committing an offence stands, that person cannot again be tried on the same facts for the offence for which he was tried or for any other offence arising therefrom. But the rule of issue estoppel in criminal trials evolved by the High Court of Australia and approved by the Judicial Committee has been applied to criminal trials in India, apart from the terms of section 403 of the Code of Criminal Procedure.

Lord Mc Dermott in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[1] observed at page 479 :

"The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "*Res judicata pro veritate accipitur*" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted of the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial.

1. L.R. (1950) A.C. 458.

And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other".

In *Sambasivam's case*[1], the appellant was tried for the offence of being in possession of ammunition in violation of Reg. 4 (1) (*b*) of the Emergency (Criminal Trials) Regulations, 1948. He was acquitted of the charge. Later he was tried for the offence of carrying a fire arm contrary to Reg. 4 (1) (*a*) of the Emergency Regulations and was convicted by the Supreme Court of the Federation of Malaya. An appeal was carried to the Judicial Committee and the legality of the conviction was challenged on the grounds, *inter alia*, that so long as the order of acquittal in respect of the carrying of ammunition stood, the facts proved in support of that charge were in the circumstances of the case clearly relevant to the second charge, and the appellant was entitled to rely upon the acquittal in so far as it was relevant to his defence. The plea so raised was acepted by the Judicial Committee.

In *Pritam Singh* v. *The State of Punjab*[1], this Court held that where a person has been tried under section 19 (*f*) of the Arms Act and is acquitted because the prosecution has failed to establish the possession of a revolver by the accused as alleged, in a subsequent trial of the offence of murder, where the possession of the revolver was a fact in issue which had to be established the prosecution could not ignore the finding at the previous trial.

In several later judgments of this Court the principle of issue estoppel has received approval: *Manipur Administration* v. *Thokchom, Bira Singh*[2], *Banwari Godara* v. *The State of Rajasthan*[3]; *Lalta and others* v. *The State of U.P.*[4]. It was also accepted in *The Assistant Collector of Customs and another* v. *L. R. Malwani and another*[5]. It is too late now to make a departure from the rule accepted by this Court. In the American Courts also the rule of issue estoppel has received approval: *Sealform* v. *United States*[6].

It is true that in *Connelly* v. *Director of Public Prosecution*[7], decided by the House of Lords there was some difference of opinion amongst the Law Lords as to the applicability of the rule to criminal trials in the English Courts. Our Criminal jurisprudence is largely founded upon the basic rules of English Law though the procedure is somewhat different. Trials by jury have been practically abolished and the cases are being tried by Judges. Several charges arising out of the same transaction can be tried under the Code of Criminal Procedure together at one trial, and specific issues are always raised and determined by the Courts. Under the English system of administration of criminal law, trials for serious offences are held with the aid the jury and it is frequently impossible to determine with certitude the specific issues on which the verdict of the jury is founded. In criminal trials under the Code of Criminal Procedure, there is no uncertainty in the determination of issues decided. Difficulties envisaged in *Connelly's case*[7] in the application of the rule of issue estoppel do not therefore arise under our system.

But it is necessary to notice the true basis of the rule. Dixon J., in *The King* v. *Wilkes*[8], observed at pages 518-519:

"..........it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same

1. A I R. 1956 S C 415.
2. (1965) M.L J. (Crl) 233: (1965) 1 S C.J. 451: (1964) 7 S.C.R. 123.
3. Cr. A No. 141 of 1960 decided on Feb., 1, 1961.
4. Cr.A. No. 185 of 1966 decided on Oct., 25, 1968.
5. Cr. As. Nos. 15 & 35 of 1967 decided on Oct., 16, 1968.
6. (1948) 332 U.S. Rep. 575.
7. (1964) L.R. 64 A.C. 1254.
8. 77 C.L.R. 511.

prisoner. * * * There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. Such rules are not to be confused with those of *res judicata*, which in criminal proceedings are expressed in the pleas of *autre fois acquit* and *autre fois convict*. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation."

The rule, does not predicate that evidence given at one trial against the accused cannot again be given in the trial of the accused for a distinct offence. As Lord Morris of Borty-Y-Gest observed in *Connelly's case*[1] at page 1325:

"............there is no rule or principle to the effect that evidence which has first been used in support of a charge which is not proved may not be used to support a subsequent and different charge, * * * *."

Can it be said in the present case that there has been a trial of the accused on an issue in a prior litigation, and an attempt is made to relitigate the same? It may be recalled that the respondents were not tried at any criminal trial in the previous case. The earlier proceeding was for binding over the respondents and 94 others to keep the peace on the case that it was apprehended that they were likely to commit breach of peace or disturb public tranquility. The primary issue which the Court was called upon to determine was whether there was any apprehension of the breach of peace or disturbance of public tranquility which necessitated the passing of the order requiring the respondents and others to give security. It is true that in support of that order the Station House Officer in his report has relied upon four incidents, one of which specifically set out the details which formed the subject-matter of the trial from which the present appeal arises. But there was no trial of the respondents for an offence in the earlier proceeding and there was no order of conviction or acquital. The rule of issue estoppel cannot, in our judgment, be extended so as to prevent evidence which was given in the previous proceeding and which was held not sufficient to sustain the order for being used in support of a charge of an offence which the State seeks to make out. The rule of issue estoppel prevents relitigation of the issue which has been determined in a criminal trial between the State and the accused. If in respect of an offence arising out of a transaction a trial has taken place and the accused has been acquitted, another trial in respect of the offence alleged to arise out of that transaction or of a related transaction which requires the Court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is prohibited by the rule of issue estoppel. In the present case, there was no trial and no acquittal. The rejection of evidence given in the earlier proceeding to sustain an order for binding over the respondents to keep the peace does not preclude the trial of the respondents in respect of the specific incident which together with the other incidents was sought to be made the basis of the order of binding over the respondents.

This Court in *L. R. Malwani's case*[2], declined to apply the rule of issue estoppel to a case arising nuder the Sea Customs Act in which there was an inquiry held by the Collector of Customs and a criminal prosecution was then filed.

In our judgment, the High Court was in error in holding that the respondents could not be tried and convicted of offences under section 324 and 323, Indian Penal Code because in the earlier proceeding under section 107 of the Code of Criminal

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1. L.R. (1964) A.C. 1254.
2. Crl. A. Nos. 15 & 35 of 1967 decided on 16th Oct., 1968.

Procedure, evidence with regard to the incident out of which offences which are the subject-matter of the present appeal was taken, and was regarded as in sufficient to sustain the order.

The appeal is allowed, and the order passed by the High Court is set aside. As, however, the sentences passed by the learned Trial Magistrate and confirmed by the Court of Session were of short duration and the respondents have been released on bail, we do not think that they should be called upon to undergo the remaining sentences. We reduced the sentences of imprisonment to the period already undergone. The appeal is allowed and the order of the Session Court is restored, subject to the notification in the sentence of imprisonment.

V.M.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.

The State of Andhra Pradesh .. *Appellant* *

v.

Yedla Perayya .. *Respondent.*

Andhra Pradesh Forest Act (V of 1882) as amended by Act (XI of 1963), sections 43 and 47 —Scope—Forest offence—Confiscation of the vehicle made obligatory upon the Magistrate, but no such restriction upon the power of the appellate Court—Power of the appellate Court to set aside the order of confiscation, if in any way restricted—Code of Criminal Procedure (V of 1898), section 520.

Section 43 of the Andhra Pradesh Forest Act (V of 1882) as amended by Act (XI of 1963) made it obligatory upon the Magistrate to confiscate the property or vehicle used in the commission of any forest offence. But, this section does not restrict the power of the appellate Court to pass any appropriate order as may be just regarding disposal of the property. There is no warrant for implying that the power conferred by section 47 of the Act upon the appellate Court is subject to some unexpressed limitation.

Appeal from the Judgment and Order dated the 25th February, 1966 of the Andhra Pradesh High Court in Criminal Revision Case No. 382 of 1964.

P. Ram Reddy, Senior Advocate (*G. S. Rama Rao*, Advocate, with him), for Appellant.

A. V. Rangam, Miss Sen, Miss A. Vedavalli and *Miss Subhashini*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Motor Lorry No. A.P.P. 4695 belonging to the respondent Yedla Perayya was sezied by the Forest Range Officer, Gokavaram, early in the morning of 25th December, 1962, when it was being used without a license for carrying eight *Yegisi* logs on Rajahmundry-Gokavaram Road. The driver of the motor lorry and another person were tried before the 2nd Additional, 2nd Class Magistrate, Rajahmundry on a complaint by the Forest Range Officer for offence under sections 35 and 36 of the Andhra Pradesh Forest Act and the rules framed thereunder. The two accused admitted that they had committed the offence of illicit transportation of timber, and on their plea of guilty they were convicted. The respondent applied to the Trial Magistrate for an order releasing the motor lorry on the plea that the offence of transportation of timber was committed without his knowledge and that the value of the timber seized was not more than Rs. 50 at the relevant time. The learned Magistrate observed:

* Crl. A. No. 195 of 1966. 4th November, 1968.

"After careful perusal of the deposition of P.W. 1, I find that there is nothing in it to indicate that the petitioner knowingly lent his lorry for the illicit transport of timber on the night of 24th December, 1963. There is also nothing in the case records to show that the petitioner allowed the lorry to illicitly transport the timber on the above date, I accordingly hold that the petitioner cannot be said to have knowingly allowed his lorry to illicitly transport the timber."

But the learned Magistrate was of the view that by section 43 of the Andhra Pradesh Forest Act, where it was proved that the value of the timber transported exceeded Rs. 50, he was enjoined to direct confiscation of the vehicle in which the forest produce was being transported without a license. In his view the value of eight logs of timber seized from the lorry was Rs. 311 at the market rate in Rajahmundry.

In appeal by the respondent to the Court of Session at Rajahmundry the order of confiscation was set aside and the High Court of Andhra Pradesh confirmed the order of the Court of Session. The State of Andhra Pradesh has appealed to this Court with certificate granted under Article 134 (1) (*c*) of the Constitution.

The Andhra Pradesh (Andhra Area) Forest Act (V of 1882) provides by section 41 that when there is reason to believe that a forest offence has been committed in respect of any timber or forest produce, such timber or produce together with all tools, ropes, chains, boats, vehicles and cattle used in committing any such offence may be seized by any Forest Officer or Police Officer. Section 43 as amended by Act (XI of 1963) provides:

"Where a person is convicted of any forest offence, the Court sentencing him shall order confiscation to the Government of the timber or the forest produce in respect of which such offence was committed, and also any tool, boat, cattle and vehicle and any other article used in committing such offence:

Provided that it shall be open to such Court not to order confiscation of any tool, boat, cattle, vehicle or any other article used in committing such offence when the value of the timber or the forest produce in respect of which such offence was committed does not exceed fifty rupees."

It may be observed that before the Forest Act was amended by Act (XI of 1963) the Magistrate was not obliged to direct confiscation of the articles, vehicles, cattle, tools or boats used for committing a forest offence."

The Trial Magistrate was of the view that after the amendment of the Forest Act by Act (XI of 1963) he had no option and he was bound on conviction of the offender in respect of any forest offence to direct confiscation of the vehicle used in the commission of such offence. Counsel for the respondent contended that if the interpretation put by the Trial Magistrate upon section 43 as amended is correct the enactment imposes an unreasonable restriction upon the fundamental right of the owner of the vehicle declared by Article 19 (1) (*c*) of the Constitution, and is on that account void Counsel urged that a statute which imposes upon a person who has himself not committed any offence or infraction of the law liability to forfeit vis valuable property must be regarded as unreasonable. It was urged that if a hehicle is stolen and then used for commission of a forest offence, or is borrowed by some person for a legitimate purpose and then used without the consent or knowledge of the owner for committing an offence under the forest Act, or where with a view to involve the owner of the vehicle into a forest offence, forest produce is surreptitiously introduced into the vehicle, and the vehicle is liable to be forfeited, the provision making it obligatory to impose the penalty of forfeiture of the vehicle must be deemed to impose on unreasonable restriction on the owner of the vehicle and is *ultra vires* on that account. It is not necessary for the purpose of this case to express any opinion on that part of the case. Assuming that the statute which enjoins the Magistrate to confiscate the vehicle used in the commission of the forest offence, even when it is used without the knowledge or consent of the owner, is valid, in our judgment, section 47 of the Act enables the Court of Session and the

High Court to make an appropriate order with regard to the vehicle which is just. That section provides:

> "Any person claiming to be interested in property seized under section 41, may, within one month from the date of any order passed under section 43, 44 or 45 present an appeal therefrom which may be disposed of in the manner provided by section 419 Code of Criminal Procedure."

The reference to S. 419 is to the Code of Criminal Procedure of 1872 in force when the Andhra Pradesh Forest Act (V of 1882) was enacted. Section 419 of the Code of 1872 is now substituted by section 520 of the Code of Criminal Procedure, 1898, and by section 520 power is conferred, *inter alia* upon the Court of appeal to direct that any order passed under sections 517, 518 or 519 by the Court subordinate thereto be stayed pending consideration by the Court of Appeal, and that Court may modify, alter or annul such order and make any further order that may be just. Section 43 of the Andhra Pradesh Forest Act does not restrict the power of the appellate Court to pass any appropriate order as may be just regarding disposal of the property. The Court of Session in the present case has on the finding recorded by the Magistrate and confirmed by it passed an order which is essentially a just order, and that has been confirmed by the High Court.

The Legislature had originally conferred a discretion both upon the Magistrate and the Court of Appeal to pass appropriate order with regard to the disposal of property used in the commission of the offence as may be just. The Legislature has thereafter amended section 43 by Act XI of 1963 and made it obligatory upon the Magistrate to confiscate the property or the vehicle used in the commission of such offence. No such restriction has, however, been placed upon the power of the appellate Court and we will not be justified, having regard to the clear expression of the legislative intent, that the power is to be limited in the manner provided by section 43. There is no warrant for implying that the power conferred by section 47 of the Act upon the appellate Court is subject to some unexpressed limitation.

The High Court was, therefore, right in holding that the motor lorry belonging to the respondent, on the finding recorded by the Magistrate, was not liable to be confiscated.

The appeal therefore fails and is dismissed.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. M. SIKRI AND K. S. HEGDE, JJ.

M/s. Tarapore & Co., Madras .. *Appellant**

v.

M/s. V/O Tractoro export, Moscow and another .. *Respondents.*

and

M/s. V/O Tractoro export, Moscow .. *Appellant*

v.

M/s. Tarapore & Co. Madras and another .. *Respondents.*

Constitution of India (1950), *Article* 136—*Appeals by Special Leave against the interim injunctions granted by the trial Judge—Ordinarily Court not interfering with interim orders—Irrevocable letter of credit, a mechanism of great importance in international trade—autonomy of an irrevocable letter of credit entitled to protection—Courts not to interfere with that mechanism.*

The "Indian Firm" entered into a contract with the "Russian Firm" for the supply of construction machinery. In pursuance of that contract, the Indian

* C.As. Nos. 2251 and 2252 of 1968 and (C.As. Nos. 2305 and 2306 of 1968). 26th November, 1968.

Firm opened a confirmed, irrevocable and divisible letter of credit with the Bank of India, Limited for the entire value of the equipment. In the strength of the aforementioned contract, the Russian Firm supplied all the machienery it undertook to supply. They were duly taken possession of by the Indian Firm and put to work.The Indian Firm complained to the Russian Firm that the performance of the machinery supplied by it was not as efficient as represented at the time of entering into the contract and consequently it had incurred and continues to incur considerable loss. In pursuance of the agreement between the parties, the suit filed by the Indian Firm was withdrawn. In view of the " Gold Clause" the price fixed for the machinery supplied stood revised and consequently the Indian Firm had to pay to the Russian Firm an additional sum of about rupees twenty-six lacs. The Russian Firm appears to have drawn drafts on the Indian Firm for the excess amount payable under the gold clause. The settlement as contemplated by the Delhi agreement not having been reached, the Indian Firm filed the suit praying that the Bank of India as well as the Russian Firm should be restrained from taking any further steps in pursuance of the letter of credit opened by the Indian Firm in favour of the Russian Firm. Therein temporary injunctions were asked for in the very terms in which the permanent injunctions were prayed for. At a subsequent stage a further injunction restraining the Russian Firm from enforcing its right under thegold clause was also prayed for. The Russian Firm opposed those applications, but the trial Judge granted the temporary injunctions asked for.

Are the temporary injunctions issued by the trial judge sustainable ?

Held, that ordinarily (this) Court does not interfere with interim orders. But herein legal principles of great importance affecting international trade are involved. An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Court should not interfere with that mechanism. Not only that. The letter of cerdit is, independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy. In the result, the temporary injunctions granted by the trial judge are set aside.

Appeals by Special Leave from the Judgment and Order dated the 9th October, 1968 of the Madras High Court in O.S.A. Nos. 26 and 27 of 1968 and Appeals by Special Leave from the Judgment and Order dated 12th April, 1968 of the Madras High Court in Applications Nos. 1760 and 2455 of 1967 in C.S. No. 118 of 1967.

M. C. Setalvad, Senior Advocate, (*V. P. Raman* and *D. N. Mishra*, Advocates, and *J. B. Dadachanji*, Advocate of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant (In C. As. Nos. 2251 and 2252 of 1968) and Respondent No. 1 (In C. As. Nos. 2305 and 2306 of 1968).

S. Mohan Kumaramangalam, Senior Advocate (*M. K. Ramamurthi*, *Mrs. Shyamala Pappu* and *Vineet Kumar*, Advocates, with him), for Respondent No. 1 (In C. As. Nos. 2251 and 2252 of 1968) and the Appellant (In C. As. Nos. 2530 and 2306 of 1968).

Rameshwar Nath and *Mahinder Narain*, Advocates o *M/s. Rajinder Narain & Co.*, for Respondent No. 2 (In all the Appeals).

The Judgment of the Court was delivered by

Hegde, J.—These are connected appeals. They arise from Civil Suit No. 118 of 1967 on the original side of the High Court of Judicature at Madras. Herein the essential facts are few and simple though the question of law that arises for decision is of considerable importance.

The Suit has been brought by M/s. Tarapore & Co., Madras (hereinafter referred to as the " Indian Firm"). That firm had taken up on contract the work of excavation of canal as a part of the Farakka Barrage Project. In that connection they entered into a contract with M/s. V/O Tractores Export, Moscow (which will

hereinafter be referred to as the "Russian Firm") for the supply of construction machinery such as Scrapers and Bulldozers. In pursuance of that contract, the Indian Firm opened a confirmed, irrevocable and devisible letter of cerdit with the Bank of India, Limited for the entire value of the equipment, *i.e.*, Rs. 66,09,372 in favour of the Russian Firm negotiable through the Bank for Foreign Trade of the U.S.S.R., Moscow. Under the said letter of credit the Bank of India was required to pay to the Russian Firm on production of the documents particularised in the letter of credit alongwith the drafts. One of the conditions of the letter of credit was that 25 per cent. of the amount should be paid on the presentation of the specified documents and the balance of 75 per cent. to be paid one year from the date of the first payment. The agreement entered into between the Bank of India and the Russian Firm under the letter of credit was "subject to the Uniform Customs and Practice for Documentary Credits (1962 Revision), International Chamber of Commerce Brochure No. 222". Article 3 of the brochure says that:

> "An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and *bona fide* holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.
>
> An irrevocable credit may be advised to a beneficiary through another bank without engagement on the part of that other bank (the advising bank), but when an a issuing bank authorises another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming bank will negotiate drafts without recourse to drawer.
>
> Such undertakings can neither be modified nor cancelled without the agreement of all concerned."

Article 8 of the brochure says:

> "In documentary credit operations all parties concerned deal in documents and not in goods.
>
> Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorisation to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.........."

The only other Article in that brochure which is relevant for our present purpose is Article 9 which reads:

> "Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any documents, or for the general and or particular conditions stipulated in the documents or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented thereby, or for the good faith or acts and or omissions, solvency, performance or standing of the consignor, the carriers or the insurers of the goods or any other person whomsoever."

On the strength of the aforementioned contract, the Russian Firm supplied all the machinery it undertook to supply by about the end of December, 1960, which were duly taken possession of by the Indian Firm and put to work at Farakka Barrage Project. They are still in the possession of the Indian Firm. After the machinery was used for sometime, the Indian Firm complained to the Russian Firm that the performance of the machinery supplied by it was not as efficient as represented at the time of entering into the contract and consequently it had incurred and continues to incur considerable loss. In that connection there was some correspondence

between the Indian Firm and the Russian Firm. Thereafter the Indian Firm instituted a suit on the original side of the High Court of Madras seeking an injunction restraining the Russian Firm from realizing the amount payable under the letter of credit. During the pendency of that suit the parties arrived at an agreement on 14th August, 1966 at Delhi (which shall be hereinafter referred to as the Delhi agreement). The portion of that agreement which is relevant for our present purpose reads as follows :

> " Tarapore and Co., Madras, agree to withdraw immediately the Court case filed by them against " Tractoro export " Moscow, in the Madras High Court.
>
> 2. Immediately on Tarapore withdrawing the case, V/O " Tractoro export agree to instruct the Bank for Foreign Trade of the USSR in Moscow, not to demand any further payment against L.C. established by Tarapore and Co., Madras for a period of six months from the due dates in the first instances. During this period both the parties shall do their best to reach an amicable settlement.
>
> 3. In case the settlement between the two parties is not completed within this period of six months V/O Tractoro export shall further extend the period of payment by further period of six months for the settlement to be completed.
>
> 4. Tarapore and Co., shall authorise their Bank to keep the unpaid portions L.C. valid for the extended period as stated above."

At this stage it may be mentioned that the Russian Firm had received from the Bank of India 25 per cent of the money payable under the letter of credit very soon after it supplied to the Indian Firm the machinery mentioned earlier. In pursuance of the aforementioned agreement the Indian Firm withdrew the suit. Thereafter there were attempts to settle the dispute. In the meantime the Indian Rupee was devalued. The contract between the Indian Firm and the Russian Firm contains the following terms :

> " Payment for the delivered goods shall be made by the Buyers in India Rupee in accordance with the Trade Agreement between the USSR and India dated 10th June, 1963. All the prices, are stated in Indian rupee. One Indian Rupee is equal to 0.186621 grammes of pure gold. If the above gold content of Indian Rupee is changed the prices and the amount of this Contract in Indian Rupee shall be revalued accordingly on the date of changing the gold parity of the Indian Rupee."

This clause will be hereinafter referred to as the ' Gold Clause '. In view of that clause, the price fixed for machinery supplied stood revised. Consequently under the contract the Indian Firm had to pay to the Russian Firm an additional sum of about rupees twenty-six lacs. Accordingly the bankers of the Russian Firm called upon the Indian Firm to open an additional letter of credit for payment of the extra price payable under the contract. They also intimated the Indian Firm that the extension of time for the payment of the price of the machinery supplied, agreed to at Delhi will be given effect to only after the Indian Firm arrange for the additional letter of credit asked for. The Indian Firm objected to this demand as per its letter of 20th September, 1966. The relevant portion of that letter reads :

> " We are rather surprised to see this, because, by our arrangement dated the 14th August, 1966, at New Delhi you had agreed to give further time for the payments on the withdrawal of the Madras High Court case. That was the only condition that was talked about and incorporated in our written agreement. If you will be good enough to refer to the agreement dated the 14th August, 1966, you will find that we were obliged to withdraw the Madras suit pending talks of settlement and immediately on our withdrawing this suit, you agreed to instruct your Bankers not to demand any further payment under the letter of credit. There is absolutely no reference in that agreement to our having to open any additional letter of credit in view of the devaluation of the Indian rupee.........
> We would therefore request you to immediately instruct your Bankers in Moscow to advise our Bankers regarding the extension of time for payment under the letter of

credit without any reference to any additional letters of credit in view of devaluation.............. Moreover, when the entire question is open for amicable settlement between us, it is not possible to determine what exactly will be amount payable and unless that amount is known, it is not possible to open additional letters of credit to give effect to the gold clause........"

On 1st November, 1966, the Russian Firm sent to the Indian Firm addendum No. 1 modifying the original contract in accordance with the gold clause. The last clause of that addendum recited that " all other terms and conditions are as stated in the above mentioned contract" (original contract). The Indian Firm objected to that addendum as well as to the demand for opening an additional letter of credit. In that connection the Russian Firm wrote a letter to the Indian Firm on 29th November, 1966. As considerable arguments were advanced on the basis of that letter we shall quote the relevant portion of that letter :

" ....We confirm that you have singed with us the addendum No. 1 to our Contract No. 61/Tarapore—220/65 dated the 2nd February, 1965, at our request for the sole and specific purpose of satisfying our bankers. We confirm further that this addendum will not in any manner prejudice the arrangement we have come to in Delhi on the 14th August, 1966, and is without prejudice to your claims and points of controversy regarding which we shall have further discussions with a view to reach an amicable settlement.

Under this addendum, the company will extend the letter of credit for one year and accept the drafts for the difference in value of 57.5 per cent due to devaluation. The final amount payable will be in accordance with the settlement."

Thereafter the Russian Firm appears to have drawn drafts on the Indian firm for the excess amount payable under the gold clause. For one reason or the other, no settlement as contemplated by the Delhi agreement was reached. The Indian firm complained that the Russian Firm never made any serious attempt to resolve the dispute whereas the Russian Firm alleged that it found no substance in the complaint made by the Indian Firm as regards the machinery supplied. In the suit as brought, as well as in these appeals that controversy is not open for examination. Suffice it to say that the parties did not amicably settle the dispute in question. When the extended time granted under the Delhi agreement was about to come to a close, the Indian Firm instituted the suit from which these appeals have arisen. In that suit the only substantive relief asked for is that the Bank of India as well as the Russian Firm should be restrained from taking any further steps in pursuance of the letter of credit opened by the Indian Firm in favour of the Russian Firm. Therein temporary injunctions were asked for in the very terms in which the permanent injunctions were prayed for. At a subsequent stage a further injunction restraining the Russain Firm from enforcing its right under the gold clause was also prayed for. The Russian Firm opposed those applications but the trial Judge granted the temporary injunctions asked for. The Russian Firm took up the matter in appeal to the Appellate Bench of that High Court which reversed the order of the trial Judge by its Order dated 9th October, 1968, but it certified that they are fit cases for a appeal to this Court. When the applications in the appeals seeking interim orders came up for consideration by this Court the Russian Firm entered its *caveat*. It not only opposed the interim reliefs prayed for, it further challenged the validity of the certificate granted by the High Court on the ground that the orders appeald against are not ' final orders ' within the meaning of Article 133 of the Constitution. Evidently as a matter of abundant caution, the Indian Firm had filed two separate applications seeking Special Leave to appeal against the orders of the Appellate Bench of the Madras High Court . After hearing the parties this Court revoked the certicates granted holding that the orders appealed against are not ' final orders ' but at the same time granted Special Leave to the Indian Firm to appeal against the orders of the Madras High Court. Civil Appeals Nos. 2051 and 2052 of 1968 are appeals filed by the Indian Firm.

Before the Appellate Bench of the High Court of Madras, the Indian Firm had objected to the maintainability of the appeals filed by the Russian Firm on the

ground that orders appealed against are not judgments within the meaning of clause 15 of the Letters Patent of the Madras High Court but that objection had been overruled by the Appellate Bench following the earlier decisions of that High Court. That contention was again raised in the appeals filed by the Indian Firm in this Court. To obviate any difficulty the Russian Firm applied to this Court for Special Leave to appeal against the interim orders passed by the trial judge. We allowed those applications and consequently Civil Appeals Nos. 2305 and 2306 of 1968 came to be filed.

In view of the appeals filed by the Russian Firm in this Court against the interim orders made by the trial judge it is not necessary to decide whether the appeals filed by the Russian Firm before the Appellate Bench of the Madras High Court were maintainable? On that question, judicial opinion is sharply divided as could be seen from the decision of this Court in *Asrumati Debi* v. *Kumar Rupendra Deb, Rajkot and others*[1]. Hence we shall confine our attention to the question whether the temporary injunctions issued by the trial judge are sustainable?

The scope of an irrevocable letter of credit is explained thus in Halsbury's Laws of England (Volume 34) paragraph 319 at page 185):

> "It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or orginating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts drawn upon it for the price of the goods, against tender by the seller of the shipping documents. The contractual relationship betwen the issuing bank and the buyer is defined by the terms of the agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefore; and, conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective."

Chalmers on "Bills of Exchange" explains the legal position in these words:

> "The modern commercial credit serves to interpose between a buyer and seller a third person of un questioned solvency, almost invariably a banker of international repute; the banker on the instructions of the buyer issues the letter of credit and thereby undertakes to act as paymaster upon the seller performing the conditions set out in it. A letter of credit may be in any one of a number of specialised forms and contains the undertaking of the banker to honour all bills of exchange drawn thereunder. It can hardly be over-emphasised that the banker is not bound or entitled to honour such bills of exchange unless they, and such accompanying documents as may be required thereunder, are in exact compliance with the terms of the credit. Such documents must be scrutinsed wit meticulous care, the maxim *de minimis non curat lex* cannot be invoked where payment is made by the letter of credit. If the seller has complied with the terms of the letter of credit, however, there is an absolute obligation upon the banker to pay irrespective of any disputes there may be between the buyer and the seller as to whether the goods are up to contract or not."

Similar are the views expressed in 'Practice and Law of Banking' by H.B. Sheldon "the Law of Banker's Commercial Credits" by H.C. Gutteridge "the law Relating to Commercial Letters of Credit" by A.G. Davis "the Law Relating to Bankers'

1. (1953) S.C.J. 300: (1953) 1 M.L.J. 710: (1953) S.C.R. 1159.

Letters of Credit" by B.C. Mitra and in several other text books read to us by Mr. Mohan Kumaramangalam, learned Counsel for the Russian Firm. The legal position as set out above was not controverted by Mr.M.C. Setalvad, learned Counsel for the Indian Firm. So far as the Bank of India is concerned it admitted its liability to honour the letter of credit and expressed its willingness to abide by its terms. It took the same position before the High Court.

The main grievance of the Indian Firm is that if the Russian Firm is allowed to take away the money secured to it by the letter of credit, it cannot effectively enforce its claim arising from the breach of the contract it complains of. It was urged on it behalf that the Russian Firm has no assets in this country and therefore and decree that it may be able to obtain cannot be executed. Therefore, it was contended that the trial Court was justified in issuing the impugned orders. The allegation that Russian Firm has no assets in this country was not made in the pleadings. That apart in the circumstances of this case that allegation has no relevance. An irrevocable letter of credit has a definite implication. It is a mechanism of great importance in international trade. Any interference with that mechanism is bound to have serious repercussions on the international trade of this country. Except under very exceptional circumstances, the Courts should not interfere with that mechanism.

For our present purpose we shall assume without deciding that the allegations made by the Indian Firm are true. We shall further assume that the suit as brought is maintainable though Mr. Kumaramangalam seriously challenged its maintainability. But yet, in our judgment, the learned trial judge was not justified in law in granting the temporary injunctions appealed against. Ordinarily this Court does not interfere with interim orders. But herein legal principles of great importance affecting international trade are involved. If the orders impugned are allowed to stand they are bound to have their repercussion on our international trade.

We have earlier referred to several well known treaties on the subject. Now we shall proceed to consider the decided cases bearing on the question under consideration.

A case somewhat similar to the one before us came up for consideration before the Queens Bench Division in England in *Hamzeh Walas and Sons* v. *British Imex Industris Ltd.*[1]. Therein the plaintiffs, a Jordanian firm contracted to purchase from the defendants, a British firm a large quantity of reinforced steel rods, to be delivered in two instalments. Payment was to be effected by opening in favour of the defendants of two confirmed letters of credit with the Midland Bank Ltd., in London, one in respect of each instalment. The letters of credit were duly opened and the first was realized by the defendants on the delivery of the first instalment. The plaintiffs complained that that instalment was defective and sought an injunction to bar the defendants from realizing the second letter of credit. Donovan, J., the trial judge refused the application. In appeal Jenkins, Sellers and Pearce L.JJ., confirmed the decision of the trial judge. In the course of his judgment Jenkins L.J., who spoke for the Court observed thus :

> "We have been referred to a number of authorities, and it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vender of the goods, which imposes upon the banker an absolute obligation to pacty, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character; and, in my judgment, it would be wrong for this Court in the present case to interfere with that established practice.
>
> There is this to be rememebered, too. A vender of goods selling against a confirmed letter of credit is selling under the assurance that nothing will preventy bim from receiving the price. That is of no mean advantage when goods manufactured in one country are being sold in another. It is, further more, to be observed that vendors are often reselling goods bought from third parties. When they

1. (1958) 2 Q.B. 172.

are doing that, and when they are being paid by a confirmed letter of credit, their practice is—and I think it was followed by the defendants in this case—to finance the payments necessary to be made to their suppliers against the letter of credit. That system of financing these operations, as I see it, would break down completely if a dispute as between the vendor and the purchaser was to have the effect of "freezing," if I may use that expression, the sum in respect of which the letter of credit was opened."

In *Urquhart Lindsay and Co. Ltd.* v. *Eastern Bank Ltd.*[1], the King's Bench held that the refusal of the defendants bank to take and pay for the particular bills on presentation of the proper documents constituted a repudiation of the contract as a whole and that the plaintiffs were entitled to damages arising from such a breach. It may be noted that in that case the price quoted in the invoices was objected to by the buyer and he had notified his objection to the bank. But under the terms of the letter of credit the bank was required to make payments on the basis of the invoices tendered by the seller. The Court held that if the buyers had an enforceable claim that adjustment must be made by way of refund by the seller and not by the way of retention by the buyer.

Similar opinions have been expressed by the American Courts. The leading American case on the subject is *Dulien Steel Products Inc., of Washington* v. *Bankers Trust Co.*[2]. The facts of that case were as follows :

The plaintiffs, Dulien Steel Products Inc., of Washington, contracted to sell steel scrap to the European Iron and Steel Community. The transaction was put through M/s. Marco Polo Group Project, Ltd., who were entitled to commission for arranging the transaction. For the payment of the commission to Marco Polo, plaintiffs procured an irrevocable letter of credit from Seattle First National Bank. As desired by Marco Polo this letter of credit was opened in favour of one Sica. The defendant-bankers confirmed that letter of credit. The credit stipulated for payment against (1) a receipt of Sica for the amount of the credit and (2) a notification of Seattle Bank to the defendants that the plaintiffs had negotiated documents evidencing the shipment of the goods. Sica tendered the stipulated receipt and a Seattle Bank informed the defendants that the Dulien had negotiated documentary drafts. Meanwhile after further negotiations between the plaintiffs and the vendees the price of the goods sold was reduced and consequently the commission payable to Marco Polo stood reduced but the defendant were not informed of this fact. Only after notifying the defendants about the negotiation of the drafts drawn under the contract of sale, the Seattle Bank informed the defendants about the changes underlying the transaction and asked them not to pay Sica the full amount of the credit. The defendants were also informed that Sica was merely a nominee of Marco Polo and has no rights of his own to the sum credit. Sica, however, claimed payment of the full amount of the credit. The defendants asked further intructions from Seattle Bank but despite Seattle Banks instructions decided to comply with Sica's request. After informing Seattle Bank of their intention, they paid Sica the full amount of the credit. Plaintiffs thereupon brought an action in the District Court of New York for the recovery of the moneys paid to Sica. The action was dismissed by the trial Court and that decision was affirmed by the Court of Appeals. That decision establishes the well known principle that the letter of credit is independent of and unqualified by the contract of sale or underlying transaction. The autonomy of an irrevocable letter of credit is entitled to protection. As a rule Courts refrain from interfering with that autonomy.

A half hearted attempt was made on behalf of the India Firm to persuade us not to apply the principles noticed above as in these appeals we are dealing with a complaint of fraud. The facts pleaded in the plaint do not amount to a plea of fraud despite the assertions of the Indian Firm that the Russian Firm was guilty of fraud.

Evidently with a view to steer clear of the well established legal position Mr. Setalvad, learned Counsel for the Indian Firm urged that the letter of credit

1. (1922) 1 K.B. 318. 2. Federal Reporter 2nd Series, 298 p. 836.

was no more enforceable as the original contract stood modified as a result of the Delhi agreement and the subsequent correspondence between the parties. It was urged that according to the modified contract the Indian Firm is only liable to pay the price that may be settled between the buyer and the seller. This contention has not been taken either in the plaint or in the arguments before the trial judge or before the Appellate Bench. It is taken for the first time in this Court. This is not purely a legal contention. The contention in question bears on the intention of the parties who entered into the agreement. No one could have known the intention better than plaintiff who was a party to the contract. If there was such an intention, the plaintiff would have certainly pleaded the same. That apart, we are unable to accept the contention that either the Delhi agreement or the subsequent correspondence between the parties modified the original contract. The Delhi agreement merely provided that the parties will try and settle the dispute out of Court, if possible. Much was made of the letter written by the Russian Firm to the Indian Firm on 29th November, 1966, wherein as seen earlier it was stated :

"that the final amount payable will be in accordance with the settlement."

This letter has to be read along with the other letters that passed between the parties. If so read, it is clear that the statement that the final payment will be made in accordance with the settlement is subject to the condition that the parties are able to arrive at a settlement. Otherwise the parties continue to be bound by the original contract subject to the extension of the time granted under the Delhi agreement for the payment of the price. As regards the additional payment demanded by the Russian Firm, there is no occasion for issuing any temporary injunction. If the Indian Firm does not comply with that demand the law will take its course. It is for that Firm to choose its course of action.

In the result we allow Civil Appeals Nos. 2305 and 2306 of 1968 with the costs of the appellant therein and set aside the temporary injunctions granted by the trial judge. The other appeals are dismissed with no order as to costs. The costs to be paid by the the Indian company.

V. M. K. —————— *Order accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S.M. SIKRI, R.S. BACHAWAT AND K.S. HEGDE, JJ.

The Union of India and others .. *Appellants**

v.

M/s. Rai Bahadur Shreeram Durgaprasad (P.) Ltd. and others. .. *Respondents.*

The Orissa Minerals Development Co. Ltd. & others .. *Interveners.*

Foreign Exchange Regulation Act, (*VII of* 1947), *sections* 12 (1), 12 (2), 22, 23 *and* 23 (A) *and Central Government Notification dated 4th August,* 1947—*Interpretation—Export of goods, no one to export any goods from India without furnishing the declaration under section* 12 (1)—*Restrictions imposed by* 12 (1) *deemed to have been imposed under section* 19 *of the Sea Customs Act,* 1878—*Section* 19 *similar to section* 12 (1) *of the Foreign Exchange Regulations Act,* 1947—*Informations called for in prescribed form, if amount to restrictions under section* 12 (1)—*Under invoicing of consignments, a contravention of section* 12 (2) *an Rule* (5) *and not a contravention of section* 12 (1).

Foreign Exchange Regulation Act, (*VII of* 1947), *sections* 12 (1), 12 (5) *and* 12 (6)—*Interpretation—Export of goods, value thereof, primarily with by the Reserve Bank and not by the Customs authorities—Customs authorities only concerned to see that no goods are exported without funishing the declartion under section* 12 (1).

The respondents are exporters of Manganese Ore. It is said that they had exported large quantities of Manganese Ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consign-

* C.As. Nos. 45 to 49 of 1968. 19th November, 1968.

ments sent by them and further that they had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of the Manganese Ore exported. It is said that by so doing they had contravened section 12 (1) of the Foreign Exchange Regulation Act, 1947 read with section 23 (A) of that Act and sections 19 and 167 (8) of the Sea Customs Act.

The only question for decision is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened section 12 (1).

Held by majority with Sikri, J. dissenting: Section 22 of the Act provides that no person when making an application or declaration to any authority or person for any purpose under the Act shall give any information or make any statement which he knows or has reasonable cause to believe to be false or not true, in any material particular. Section 23 prescribes that if any person contravenes the provisions of section 12 or of any rule, direction or order made thereunder he shall (*a*) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner provided in the Act or (*b*) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. In view of these provisions it is clear that if the information given by the respondents in the aforementioned declarations was false to the knowlege of those who made those declarations. The contravention of the above provisions is punishable under section 23. Section 23 (A) as it stood at the relevant time provided that: without prejudice to the provisions of section 23 or any other provision contained in this Act, the restrictions imposed by sub-section (1) of section 12 ......shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878 and all provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted. If the allegations mentioned in the show cause notices come within the scope of a section 23 (A) then it necessarily follows that the will be governed by the provisions in section 19 and section 167 (8) of the Sea Customs Act, 1878. Section 19 of the Sea Customs Act provides that the Central Government may from time to time by notification in the Official Gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontiers as defined by the Central Government. This section is similar to section 12 (1) of the Act. Section 167 (8) provides for punishments for offences under that Act.

Before a case can be held to fall within the scope of section 23-A it must be shown that there has been a contravention of the restrictions imposed by section 12 (1). Therefore we have to find out what those restrictions are? The only restriction placed by section 12 (1) read with the Central Government Notification dated 4th August, 1947, is that no one should export any goods from this country without furnishing the declaration mentioned in section 12 (1). Admittedly the stipulated declarations in the prescribed forms have been furnished. The evidence specified have also been given. The declarations given do satisfy the requirements of section 12 (1) though they do not correctly furnish all the informations asked for in the form. Such declarations cannot be considered as *non est*. The informations called for in the prescribed form cannot be considered as restrictions imposed by section 12 (1). They are merely informations called for for the proper exercise of the powers under the Act. Many of them do not relate to the restrictions imposed by section 12 (1). Neither section 12 (1) nor any other provision in the Act empower the rule-making authority to add to the restrictions imposed by section 12 (1). For finding out the restrictions imposed by section 12 (1) we have only to look to that section. The requirement of that section is satisfied if the stipulated declaration supported by the evidence prescribed or specified is furnished. The contravention complained of in this case is really the contravention of section 12 (2) and rule 5. The former is punishable under section 23 and the

latter under section 23 read with section 22. The main purpose of section 12 (1) is to get a declaration from the exporter that he has either brought or will bring back the amount representing the full export value of the goods exported. There are other provisions in the Act to deal with other situations.

There are two facets in every export, one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export. Broadly speaking the former aspect is dealt with by the Customs authorities and the latter either by the Reserve Bank or by the Director of Enforcement. The price of goods exported has to be mentioned in the invoice. But the Reserve Bank has power to examine whether the price mentioned in the invoices correct. Section 12 (5) provides that where in relation to any goods exported the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods. Sub-section (6) of section 12 says that for the purpose of ensuring compliance with the provisions of that section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods have been or will within the prescribed period by paid in the prescribed manner. These provisions go to indicate that so far as the value of the goods exported is concerned the matter is left primarily in the hands of the Reserve Bank, and the Customs Authorities are not burdened with that work. This aspect becomes relevant in ascertaining the true scope of section 12 (1). If we bear in mind the scheme of the Act, it is clear that so far as the Customs authorities are concerned all that they have to see is that no goods are exported without furnishing the declaration prescribed under section 12 (1). Once that stage is passed the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

Per *Sikri, J.*—Section 12 (1) and the notification dated 4th August, 1947 made under it, impose a conditional prohibition. The section confers a power on an exporter to lift the bar by a unilateral declaration. When such a power is conferred on an exporter by a statute, good faith on his part must at least be implied and be a condition pre-requisite. This construction is necessary in order to prevent abuse of the power given by the Act. If the exporter makes a deliberately false declaration he controvenes section 12 (1) because he has not made the statutory declaration in good faith. It is not necessary to say that the declaration becomes a nullity because the breach of good faith, a condition pre-requisite, is itself a contravention of the conditional prohibition or restriction, within section 167 (8) of the Sea Customs Act read with section 23-A and section 12 (1) of the Exchange Act. Clerical mistakes and mistakes made *bona fide* even in respect of material particulars are not within the mischief of section 12 (1), but a deliberate falsehood and a deliberate evasion of the provisions of section 12 (1) come within section 12 (1). Otherwise the ambit of section 12 (1), read with section 23-A, would be narrowed to the point of extinction. An exporter and persons concerned in the export could with impunity give a deliberately false declaration but in apparent compliance with section 12 (1), and deprive this country of foreign exchange. An interpretation which will make a mockery of the section cannot be given. But what about persons concerned in the illegal export? It is the persons concerned in the export which in most cases enable the exporter to successfully evade the provisions of the Exchange Act. These persons are taken care of only under the Customs Act. If they are covered by section 167 (8), there is no reason to exclude the exporter himself. It is not unusual to make persons liable both to penalties under the Sea Customs Act and the Exchange Act. It is

indeed conceded that if no declaration is given under section 12 (1) and the goods are exported, the exporter and the persons concerned in the export would be liable to be proceded both under section 167 (8) of the Sea Customs Act and Exchange Control Act. There can be no distinction between such exporter and an exporter who gives a deliberately false declaration for the purpose of the applicability of section 167 (8) of the Sea Customs Act. Section 23-A read with section 12 (1) calls in the aid of Customs authorities to achieve the same object, but ropes in alongwith the exporter the persons concerned in the prohibited export.

Appeals from the Judgment and Order dated the 20th September, 1967 of the Madras High Court in Writ Appeals Nos. 247 to 251 of 1966.†

C.K. Daphtary, Attorney-General for India, *Niren De*, Solicitor-General of India, and *N. S. Bindra* and *Mohan Kumaramangalam*, Senior Advocates (*R.H. Dhebar, A.S. Nambiar* and *S.P. Nayar*, Advocates with them) for Appellants (In C.As. Nos. 45 and 47 to 49 of 1968).

Niren De, Solicitor-General of India, and *Mohan Kumaramangalam* and *N.S. Bindra*, Senior Advocates, (*R.H. Dhebar, A.S.Nambiar* and *S. P. Nayar*, Advocates, with them) for Appellants (In C.A. No. 46 of 1968).

A.K. Sen, Senior Advocate (*Soli Sorabji, S.R. Vakil, B.D. Barucha, G. L. Sanghi* and *S.K. Dholakia*, Advocates and *M/s. J.B. Dadachanji & Co.*, Advocates with him), for Respondents (In C.A. No. 45 of 1968).

N.A. Palkhivala, Senior Advocate (*Soli Sorabji, D.N. Misra, S.R. Vakil and B.D. Barucha*, Advocates and *M/s. J. B. Dadachanji & Co.*, Advocates, with him), for Respondent (In C.As. Nos. 46 and 49 of 1968).

G.L. Sanghi, S.R. Vakil and *B.D. Barucha*, Advocates, and *M/s. J. B. Dadachanji & Co.*, Advocates, for Respondents (In C.A. No. 47 of 1968) and Respondent (In C.A. No. 48 of 1968).

N.A. Palkhivala, Senior Advocate (*P.P. Ginwala, D. N. Mukherjee* and *Ajit Choudhury*, Advocates with him for Interveners Nos. 1 to 4.

A.K. Sen, Senior Advocate (*S.D. Khetri, Avadh Behari* and *R.N. Bajoria*, Advocates with him), for Intervener No. 5.

N.A. Palkhivala, Senior Advocate (*D.N. Gupta*, Advocate, with him), for Intervener No. 6.

N.A. Palkhivala, Senior Advocate (*A.K. Basu S.C. Mitter* and *I.N. Shroff*, Advocates, with him), for Intervener No. 7.

M.C. Chagla, Senior Advocate (*D.N. Gupta*, Advocate, with him), for Intervener No. 8.

M.C. Setalvad, Senior Advocate *M.K. Banerjee*, Advocate and *M/s. J.B. Dadachanji & Co.*, Advocates, with him), for Intervener No. 9.

The Court delivered the following judgments

Sikri, J.—These five appeals by certificate are directed against the judgment of the High Court of Madras whereby the High Court accepted the Writ Appeals against the judgment of Kailasam, J., in Writ Petitions Nos. 1592, 1593, 1594 and 1601 of 1966 and 3948 of 1965, and directed the issue of writs of prohibition to the Union of India, the Collector of Customs, Madras, and the Deputy Collector of Customs, Visakhapatnam, appellants before us, prohibiting them from taking any action in pursuance of certain show-cause notice issued by the Deputy Collector Customs, Visakhapatnam. Common questions of law are involved in these appeals and it would suffice if I give facts in Writ Petition No. 1592 of 1966 out of which Civil Appeal No. 45 of 1968 arises.

The relevant facts in that writ petition, for appreciating the points raised before us, are as follows : On 17th February, 1965, the Deputy Collector of Customs,

† (1969) 1 M.L.J. 547 : I.L.R. (1968) 3 Mad. 421.

Visakhapatnm, issued memorandum No. S/21/14/65 to M/s. Rai Bhadur Seth Shreeram Durgaprasad (Private) Ltd., Tumsar, and five others, hereinafter referred to as the Shippers. In this memorandum, in brief, it was stated that the Shippers had entered into a formal contract on 13th October, 1965, with M/s. Inter Contenental Ores Supply Corporation, New York, for the Shipment of 20,000 tons of Indian Manganese Ore of the grade of 43 per cent Mn., from the port of Visakhapatnam at a price of $0.67 per unit of Manganese per dry long ton, f.o.b. Visakhapatnam Bombay. The Shippers exported from the port of Visakhapatnam 3,300 tons of Indian Manganese per *S. S. 'ALPHEM'* under the cover of Shipping Bill No. 187 dated 20th March, 1957, declaring therein that the export was being made in pursuance of the aforesaid contract. A G.R.I. form was attached. It was stated that a certain note-book which had been seized earlier in August, 1963 disclosed that a sumof $25298.24 was received on 21st April, 1957, from INOSCO, *i.e.*, Intercontinental Ores Supply Corporation, New York, the consignee of the subject goods, the amount having been credited to an account in the name of Gangadhar Narsinghdas Agrawal with the Trust Co., of North America, 115, Broadway, New York. It was further alleged in the memorandum that the Shippers had derived financial benefits in respect of the subject export over and above those revealed to the Customs Authorities and/or other concerned authorities and the information about them was deliberately suppressed. It was further alleged that this constituted a contravention of section 12 (1) of the Foreign Exchange Regulation Act, 1947, read with Notification No. 12 (17)-F. 1/47 dated 4th August, 1947, as amended issued thereunder and the Foreign Exchange Regulation Rules, 1952.

I may mention that by this notification the Central Government had prohibited

> " the export otherwise than by post of any goods either directly or indirectly to any place outside India other than any of the countries or territories in the Schedule annexed to this order unless a declaration supported by such evidence as may be prescribed is furnished by the export to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner."

According to the Deputy Collector Customs, the goods have been thus exported in contravention of the restrictions and prohibitions imposed under section 19 of the Sea Customs Act, 1878, read with section 12 (1) and the Notification No. 12 (17)-F. 1/47 dated 4th August, 1947, issued thereunder, and section 23-A of the Foreign Exchange Regulation Act, 1947, which exportation constituted an offence liable to be punished under section 167 (8) of this Sea Customs Act, 1878. Accordingly, the parties concerned were called upon to explain the matter and show cause in writing to the Collector of Customs, Madras, why a penalty should not be imposed on them him under section 167 (8) of the Sea Customs Act, 1878.

It appears that a number of such memoranda were issued in respect of diverse shipments. Thereupon five petitions were filed in the High Court at Madras. In Writ Petition No. 1592 of 1966 it was alleged that 125 show cause notices had been issued to the petitioners on various dates and it was prayed that a writ of prohibition or other appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the respondents from taking any action in pursuance of the said showcause memos. may be issued.

Various allegations were made but I need only mention the following allegations. It was submitted that the petitioners had complied with the statutory provisions inasmuch as a declaration in statutory form had been furnished to the prescribed authority, to wit the Collector of Customs, and the Collector of Customs, having passed the consignments for shipment, had no further right or jurisdiction to take proceedings relating to the consignments in question. It was contended that if a declaration is found to be false, it did not mean that there was a breach of the provisions of section 12 (1)

In reply it was contended that what was required under section 12 (1) of the Foreign Exchange Regulation Act and the Rules was not any value but the actual

amount representing the full export value, and a mere declaration of any value would not be sufficient compliance with the provisions of section 12 (1) of the Foreign Exchange Act.

The learned Single Judge, Kailasam, J., dismissed the petitions. Various points were urged but on the point addressed to us he held that the declaration to be given by the exporters meant not only that the value of the goods will be paid in the prescribed manner but also that the full export value of the goods given is the correct value.

I may mention that before the Division Bench the case of the Revenue was classified in an affidavit and we may set out para 5 thereof :

"Since the Court has now directed the respondents to file a supplemental affidavit clarifying the stand taken by the department I state respectfully that the stand taken by the department both in the show cause memo. and here is that the essence of the offence committed by the appellants is that in the declaration required under section 12 (1) of the Foreign Exchange Regulation Act, they have deliberately given also particulars supported by false evidence. By giving this fraudulent declaration, they have secured the export of their goods. This fraud vitiates the declaration itself, thereby making the export one in violation of the prohibition contained in section 12 (1) of the Foreign Exchange Regulation Act."

It is not necessary to set out the *modus operandi* adopted by the petitioners but I may mention that it was contended that a scheme was entered into prior to the actual export and the goods were under-valued deliberately and the Department was induced to accept their declarations by means of false evidence and fraudulent suppression of facts. It is suggested that by this method a sum of Rs. 3,20,00,000 had been suppressed and there has been a failure to repatriate a corresponding amount of foreign exchange which had been earned surreptitiously. It was further stated that this scheme was adopted for all the shipments covered by the show cause notices, and also for many other shipment in respect of which show cause notices yet remain to be issued.

The Division Bench on appeal came to the conclusion that as the declarations were made under section 12 (1) and as they were scrutinised by the authorities it is not possible to contend that these goods were either exported or attempted to be exported in violation of the prohibitions or restrictions imposed by law and are, therefore, liable to be confiscated under section 167 (8) of the Sea Customs Act. The Division Bench further held that the alleged fraud on the part of the petitioners did not make any difference. According to the Division Bench 'if the petitioners had misled the authorities by false representations or failed thereby to repatriate foreign exchange, by virtue of his obligation under section 12 (2), these are different offences for which separate and specific penalties can be imposed."

The relevant statutory provisions at the time of exportation were as follows:

" *The Foreign Exchange Regulation Act*, 1947.

section 12. (1)—The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place or specified unless a declaration supported by such evidence as may be prescribed or so specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods have been, or will within the prescribed period be paid in the prescribed manner.

(2) Where any export of goods have been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the said goods shall, except with the permission of the Reserve Bank, do or refrain from doing any act with intent to secure that,

(*a*) the sale of goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade, or

(*b*) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid :

Provided that no proceedings in respect of any contravention of this sub-section shall be instituted unless the prescribed period has expired and payment for the goods representing the full amount as aforesaid has not been made in the prescribed manner.

(3) Where in relation to any such goods the said period has expired and the goods have not been sold and payment therefor has not been made as aforesaid, the Reserve Bank may given to any person entitled to sell the goods or to procure the sale thereof, such directions as appear to it to be expendient for the purpose of securing the sale of the goods and payment therefor as aforesaid and without prejudice to the generality of the foregoing provisions, may direct that the goods shall be assigned to the Central Government or to a person specified in the directions.

(4) Where any goods are assigned in accordance with sub-section (3), the Central Government shall pay to the person assigning them such sum in consideration of the net sum recovered by or on behalf of the Central Government in respect of the goods as may be determined by the Central Government.

(5) Where in relation to any such goods the value as stated in the invoice is less than the amount which is the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods.

(6) For the purpose of ensuring compliance with the provisions of this section and any order or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods has been, or will within the prescribed period be, paid in the prescribed manner.

Section 22.—No person shall, when complying with any order or direction under section 19 or with any requirement under section 19-B or when making any application or declaration to any authority or person for any purpose under this Act, give any information or make any statement which he knows or has reasonable cause to believe to be false, or not true, in any material particulars.

Section 23.—(1) If any person contravenes the provisions of section 4, section 5, section 9 or sub-section (2) of section 12 or of any rule, direction or order made thereunder, he shall—

(*a*) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Diector of Enforcement in the manner hereinafter provided, or

(*b*) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(1-A) Whoever contravenes—

(*a*) any of the provisions of this Act or of any rule, direction or order made thereunder, other than those referred to in sub-section (1) of this section and section 19, shall, upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both;

(*b*) any direction or order made under section 19 shall, upon conviction by a Court, be punishable with fine which may extend to two thousand rupees.

(1-B) Any Court trying a contravention under sub-section (1) or sub-section (1-A) and the authority adjudging any contravention under clause (*a*) of sub-section (1) may, if it thinks fit, and in addition to any sentence or penalty which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or any other money or property, in respect of which the contravention has taken place, shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

Explanation.—For the purpose of this sub-section, property in respect of which contravention has taken place shall include deposits in a bank, where the said property is converted into such deposits.

(2) Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898, it shall be lawful for any Magistrate of the first class, specially empowered in this behalf by the State Government, and for any Presidency Magistrate to pass a sentence of fine exceeding two thousand rupees on any person convicted of an offence punishable under this section.

(3) No Court shall take cognizance—

(*a*) of any offence punishable under sub-section (1) except upon complaint in writing made by the Director of Enforcement, or

(*b*) of any offence punishable under sub-section (1-A) of this section or under section 54 of the Indian Income-tax Act, 1922, as applied by section 19 of this Act, except upon complaint in writing made by the Director of Enforcement or any officer authorised in this behalf by the Central Government or the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint, shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

(4) Nothing in the first proviso to section 188 of the Code of Criminal Procedure, 1898, shall apply to any offence punishable under this section.

Section 23-*A*—Without prejudice to any provisions of section 23 or to any other provision contained in this Act, the restrictions imposed by sub-sections (1) and (2) of section 8, sub-section (1) of section 12 and clause (*a*) of sub-section (1) of section 13 shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1879, and all the provisions of that Act shall have effect accordingly, except that section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted."

"*The Sea Customs Act*, 1878

167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :—

Offences 1	*Sections of this Act to which offence has reference* 2	*Penalties* 3
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or	18 & 19	such goods shall be liable to confiscation; and
if any attempt be made so to import or export any such goods; or		any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.
if any such goods be found in any package produced to any officer of Customs as containing no such goods; or		
if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India; or		
if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.		

"*Foreign Exchange Regulation Rules*, 1952.

3. *Form of declaration.*—(1) A declaration under section 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Gazette of India specify as appropriate to the requirements of a case.

(2) Declarations shall be executed in sets of such number as indicated on the forms.

4. *Authority to whom declaration to be furnished.*—(1) The original of the declaration shall be furnished to the Collector of Customs; provided that when export is by post, the original of the declaration shall be furnished to the postal authorities.

(2) Copies of the declaration shall be submitted to the authority and in the manner specified on forms.

(3) The documents pertaining to every export passed by the Customs shall within 21 days from the date of the export, be submitted to the authorised deale

mentioned on the relevant declaration form, unless the Reserve Bank, in its discretion, authorises otherwise.

5. *Evidence in support of declaration.*—(1) The Reserve Bank or subject to such directions, if any, as may be given by the Reserve Bank, the Collector of Customs or the postal authorities, may, to satisfy themselves of due compliance with section 12 of the Act, require such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India, or has a place of business in India.

(2) The Reserve Bank, or subject to such corrections, if any, as may be given by the Reserve Bank, the Collector of Customs, or the Postal authorities may requires any exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them.

(*i*) ....

(*ii*) that the invoice value stated in the declaration is the full value of the goods; and (*iii*) that the amount representing the full export value of the goods has been or will be paid to the exporter. Explanation...................."

The points which have emerged from the discussion at the Bar and which require determination may be formulated thus:

(1) What is the meaning of the expression "restrictions imposed by sub-section (1) of section 12" occurring in section 23-A of the Exchange Act? Can other sections of the Exchange Act be looked at for determining the ambit of the restrictions imposed by section 12 (1)? Do restrictions imposed under the Rules made under the Exchange Act and relating to section 12 (1) come within the meaning of this expression?

(2) What is the true meaning of the words

"a declaration supported by such evidence as may be prescribed or so specified is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be paid in the prescribed manner"?

Is it necessary that the declaration shall be made honestly or in good faith? Should it disclose the true export value? Is it a breach of the sub-section if a declaration is made honestly but happens to showincorrect export value to a small but not material extent? Does not a deliberately false declaration contravene the provisions of section 12 (1)?

(3) If an action is a contravention of section 12 (1) and other provisions of the Exchange Act, *e.g.*, sections 22, 23, 12 (2), 12 (3) and 12 (5), was it the intention that it should be treated as a contravention of section 12 (1)?

Before dealing with point (1) mentioned above, a few preliminary observations may be made. I have to construe an Act which was enacted in the interest of the national economy. A deliberate large-scale contravention of its provisions would affect the interests of every man, woman and child in the country. Such an Act, I apprehend, should be construed so as to make it workable, it should, however, receive a fair construction, doing no violence to the language employed by the Legislature. It was said that if two constructions are possible the one that is in favour of the subject should be accepted. It is not necessary to pronounce on this proposition for I have come to the conclusion that there is one true construction of section 12 (1). But I should not be taken to be assenting to this proposition in so far as it is applicable to an enactment like the Exchange Act, for no subject has a right to sabotage the national economy.

Coming to the first point, I find that the following words of Lord Blackbur. express my views as to how the construction of section 23-A should be approached

He was dealing with a case where a single section of an Act of Parliament has been introduced into another Act. He said in *The Mayor of Portsmouth* v. *Charles Smith*[1] :

> " When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by the way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to."

It seems to me that this is the correct way of looking at section 23-A of the Exchange Act for another reason. The restrictions imposed by section 12 (1) cannot be different for the purpose of the Exchange Act from that for the purposes of section 167 (8) of the Sea Customs Act, for a breach of section 12 (1) may also be punishable under the Exchange Act. In other words, the same contravention may attract penalties under the Sea Customs Act as well as the Exchange Act, and it would be incongruous to hold that the restrictions imposed by a section are different for different Acts.

Then am I entitled to take into account the restrictions imposed by the Rules made under section 27 of the Exchange Act? It seems to me that rules not referrable to section 12 (1) cannot be taken into account, but any restrictions imposed by rules referrable to section 12 (1) must be treated as restrictions imposed by section 12 (1). Section 12 (1) itself contemplates rules being made on three points, *i.e.*, (1) the evidence which is to support the declaration. (2) the authority to which the declaration is to be furnished; and (3) manner of payment. It was said that the words " by section 12 (1) " exclude the restrictions made under the Rules. But though in some contexts and scheme of an Act this proposition may be true, the general rule is as stated by Lord Alverstone, C.J., in *Wellingdale* v. *Norris*,[2] as follows :

> " If it be said that a regulation is not a provision of an Act, I am of opinion that *Rex* v. *Walker*[3], is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enable an authority to make regulations, a regulation made under the Act, becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done."

These observations were approved by the House of Lords in *Wicks* v. *Director of Public Prosecution*[4], thus:

> " There is, of course, no doubt that, when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, *i.e.*, which is *intra vires* of the regulation making authority, should be regarded as though it were itself an enactment. As the Court of Criminal Appeal has pointed out in its judgment, that was decided by the Divisional Court in *Willingdale* v. *Norris*[2], and it appears to me that that decision is prefectly correct. Consequently, the charge against the appellant here was, in effect, that he had committed crimes defined or contained in the Act of Parliament."

The Court of Criminal Appeals has stated in *R.* v. *Wicks*[5], as follows:

> " The first observation which the Court would make is that they are in complete agreement with the decision of the Divisional Court in *Willingdale* v. *Norris*,[2] that, where a statute enables an authority to make regulations, a regulation made

1. L.R. (1885) 10 A.C. 364, 371.
2. (1909) 1 K.B. 57, 64.
3. (1875) L.R. 10 Q.B. 355.
4. (1947) 1 All E.R. 205, 206.
5. (1946) 2 All E.R. 529, 531.

under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done. It is, therefore, clear that the regulations must be read as though they were contained in the Act itself. They derive their efficacy solely from the Act and accordingly expire with the Act, but it may be that the Legislature has provided that some restrictions or consequences shall remain effective notwithstanding the expiration of the Act."

In a recent case, *Rathbone* v. *Eandock*[1], the Divisional Court following these cases held that regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955, was for the purpose of obedience or disobedience a provision of the Road Traffic Act, 1930.

In *Dr. Indramani Pyarelal Gupta* v. *W. R. Nathu and others*[2], this Court was concerned, *inter alia*, with the interpretation of section 3 (1) of the Forward Contract (Regulation) Act, 1952, which used the words " such duties as may be assigned by or under this Act." Ayyangar, J., speaking for the majority, observed:

" Learned Counsel is undoubtedly right in his submission that a power conferred by a by-law is not one conferred " by the Act " for in the context the expression " conferred by the Act " would mean " conferred expressly or by necessary implication by the Act itself............The words " *under the Act* " would, *in that context*, signify what is not directly to be found in the statute itself but is conferred or imposed by virtue of powers enabling this to be done; in other words, by laws made by a subordinate law-making authority which is empowered to do so by the parent Act. This distinction is thus between what is directly done by the enactment and what is done indirectly by rule-making authorities which are vested with powers in that behalf by the Act. (vide *Hubli Electricity Bombay Ltd.* v. *Province of Bombay*[3], and *Narayanaswami Naidu* v. *Krishna Murthi*[4]."

The observations of Subba Rao, J., as he then was, at page 775, relied upon by the appellants are these:

" I would, therefore, construe the words " by or under this Act, or as may be prescribed " as follows: " by this Act" applies to powers assigned *proprio vigore* by the provisions of the Act; " Under this Act " applies to an assignment made in exercise of an express power conferred under the provisions of the Act; and " may be prescribed " takes in an assignment made in exercise of a power conferred under a rule. This construction gives a natural meaning to the plain words used in the section and avoids stretching the language of a statutory provision to save an illegal by-law."

In my opinion that case does not assist me because the Court was construing the words " by or under the Act," and Ayyangar, J., specifically discussed the meaning of " by the Act " *in the context*.

Regarding the case of *United States* v. *George R. Eaton*[5], relied on appellants' behalf, I find that the Supreme Court of the United States explained and distinguished that case in *Singer* v. *United States*"[6] as follows ;

" *United States* v. *Eaton*[5], turned on its special facts, as *United States* v. *Grimaud*[7] emphasizes. It has not been construed to state a fixed principle that a regulation can never be a " law " for purposes of criminal prosecutions. It may or may not be, depending on the structure of the particular statute. The *Eaton case*[5] involved a statute which levied a tax on oleomargarine and regulated in detail oleomargarine manufacturers. Section 5 of the statute provided for the keeping of such books and records as the Secretary of the Treasury might require. But it pro-

1. (1962) 2 All E.R. 257.
2. (1963) 1 S.C.R. 721, 737: (1963) 2 S.C.J. 59.
3. L R. (1949) 76 I.A. 57, 66 : (1949) 2 M.L.J. 30.
4. I.L.R. (1958) Mad. 513, 547 : (1958) 1 M.L.J. 367.
5. 36 L. ed. 591.
6. 89 L. ed. 285, 290.
7. 220 U.S. 506, 518, 519: 55 L. ed. 563, 568 31 S. Ct. 480.

vided no penalty for non-compliance. Other sections, however, laid down other requirements for manufacturers, and prescribed penalties for violations. Section 20 gave the Secretary the power to make " all needful regulations " for enforcing the Act. A regulation was promulgated under section 20 requiring wholesalers to keep a prescribed record. The prosecution was for non-compliance with that regulation. Section 18 imposed criminal penalties for failure to do any of the things " required by law." The Court held that the violation of the regulation promulgated under section 20 was not an offence. It reasoned that since Congress had prescribed penalties for certain acts but not for the failure to keep books the omission could not be supplied by regulation. And Congress had not added criminal sanctions to the rules promulgated under section 20 of the Act."

I would in this connection prefer to apply the English decisions referred to above as section 12 (1) itself does not impose any restrictions and contamplates certain things to be prescribed.

Coming now to the construction of section 12 (1), it seems to me that what it requires is a declaration of some actual figure which according to the declarant represents 'the full export value.' Otherwise there is no point in requiring support of such evidence as may be prescribed. Further it is clear that some actual figure has to be mentioned when the exporter declares that he has received the amount representing the full export value. I apprehend that the same applies in the case where the amount has not yet been received. The rules make this clear. Rule 5 (2) (*ii*) which require the invoice value stated in the declaration to be the full export value of goods, is referrable to section 12 (1) of the Exchange Act and may be taken to indicate that an actual figure has to be mentioned. It may be an estimate if the goods have not been sold before the export, but a figure must be indicated.

Coming to the crux of the problem, does section 12 (1) by itself require absolutely correct particulars? It is said that section 12 (1) does not require it for section 22 requires the exporter only to make a declaration " which he knows or has reasonable cause to be false or not true in any material particulars." How could it be that if section 12 (1) itself requires absolutely correct particulars, section 22 limits the requirement? It seems to me that there is force in this contention but only to a limited extent. Section 12 (1) and the notification dated 4th August, 1947, made under it, impose a conditional prohibition. The section confers a power on an exporter to lift the bar by a unilateral declaration. When such a power is conferred on an exporter by a statute, good faith on his part must at least be implied and be a condition pre-requisite. This construction is necessary in order to prevent abuse of the power given by the Act. (See Maxwell on Interpretation of Statutes, 11th Edition, page 116). If the exporter makes a deliberately false declaration he contravenes section 12 (1) because he has not made the statutory declaration in good faith. It is not necessary to say that the declaration becomes a nullity because the breach of good faith, a condition pre-requisite, is itself a contravention of the conditional prohibition or restriction, within section 167 (8) of the Sea Customs Act read with section 23-A and section 12 (1) of the Exchange Act. Clerical mistakes and mistakes made *bona fide* even in respect of material particulars are not within the mischief of section 12 (1), but a deliberate falsehood and a deliberate evasion of the provisions of section 12 (1) come within section 12 (1). Otherwise the ambit of section 12 (1), read with section 23-A, would be narrowed to the point of extinction. An exporter and persons concerned in the export could with impunity give a deliberately false declaration but in apparent compliance with section 12 (1), and deprive this country of foreign exchange. I can not give an interpretation which will make a mockery of the section. But it is said that other sections of the Exchange Act will take care of such an exporter. He can be prosecuted under section 23 (1-A) read with section 22. He can be sentenced to imprisonment which may extend to two years. He can also be fined to an unlimited extent. The Foreign Exchange lost can be retrieved by a Court acting under section 23 (1-B). This may be true that the exporter is liable as stated above. But what about persons concerned in the illegal export? It is the persons concerned in the export which in most cases enable the exporter to successfully evade the provisions of the Exchange

Act. These persons are taken care of only under the Customs Act. If they are covered by section 167 (8), there is no reason to exclude the exporter himself. It is not unusual to make persons liable both to penalties under the Sea Customs Act and the Exchange Act. It is indeed conceded that if no declaration is given under section 12 (1) and the goods are exported, the exporter and the persons concerned in the export would be liable to be proceeded both under section 167 (8) of the Sea Customs Act and the Exchange Control Act. I can draw no distinction between such an exporter and an exporter who gives a deliberately false declaration for the purpose of the applicability of section 167 (8) of the Sea Customs Act.

I am not impressed by the argument that the Foreign Exchange Act deals with the basic policy regarding foreign exchange and it was not the intention to punish offenders who violate foreign exchange restrictions under the Sea Customs Act. It is section 23-A of the Exchange Act which itself deems the restrictions imposed under section 12 (1) to have been imposed under section 19 of the Sea Customs Act. Not only that. The opening sentence of section 23-A makes it clear that this is without prejudice to section 23 and to any other provisions in the Exchange Act. In other words, the provisions of section 23 and other relevant sections are not affected or limited. They will have their full operation.

The fact that the exporter may be proceeded under section 12 (2) (I may assume that this is so for the purpose of this case)for non-payment of the full amount payable by the foreign buyer, or that the Reserve Bank can in the eventualities mentioned in section 12 (5) require the holding up of shipping documents or that the Reserve Bank by exercising powers under section 12 (6) secure contracts and other evidence to discover the full amount payable do not throw any light on the Construction of section 23-A and section 12 (1) except that the Legislature is anxious that the "full export value" shall be received in this country. Section 23-A read with section 12 (1) calls in the aid of Customs authorities to achieve the same object, but ropes in alongwith the exporter the persons concerned in the prohibited export.

I am not able to appreciate how the existence of section 167 (37), section 167 (72) and section 167 (81) is of any assistance for the purpose of interpreting section 23-A and section 12 (1) of the Exchange Act. It may be—I do not decide it—that an exporter, like the respondents, will also be liable to be proceeded against under these items of section 167.

Taking the facts as alleged by the Customs authorities to be true, as they must be taken to be true for the purpose of this application under Article 226, it seems to me that no case for the issue of a writ of prohibition has been made out. In the result the judgment of the Appeal Court is reversed and that of the learned Single Judge restored. The appellants will have costs incurred in this Court. One hearing fee.

Hegde, J. for *Bachawat, J.*, and himself—We had the advantage of studying the judgment just now delivered by our brother Sikri, J, but we regret that we are unable to agree with the conclusions reached by him. After carefully analysing the arguments advanced before us we have come to the conclusion that no grounds were made out to interfere with the order of the Appellate Bench of the Madras High Court. We shall now proceed to give our reasons in support of our conclusion.

The respondents in these appeals are exporters of manganese ore. It is sadi that they had exported large quantities of manganese ore after ostensibly complying with the formalities of law but in reality they had under-invoiced the various consignments sent by them and further that they had failed to repatriate foreign exchange of the value of about three crores of rupees obtained by them as the price of the manganese ore exported. It is said that by so doing they had contravened section 12 (1) of the Foreign Exchange Regulation Act 1947 (to be hereinafter referred to as the Act) read with section 23 (A) of that Act and sections 19 and 167 (8) of the Sea Customs Act. The case for the appellants is that during the search of the house of some of the respondents on suspicion that they had hoarded gold

certain documents from the house of some of the respondents were seized and those documents disclosed the facts set out above. On the basis of the said information the Deputy Collector of Customs Visakhapatnam issued several notices to the respondents requiring them to show cause why action should not be taken against them under the aforementioned provisions. On receipt of those notices the respondents moved the High Court of Madras under Article 226 of the Constitution praying that that Court may be pleased quash the show cause notices in question and prohibit the appellants from taking any further action on the basis of those notices. Those petitions were dismissed by Kailasam, J., on 1st September, 1966 but his orders were reversed by the Appellate Bench of that Court by its Judgment dated 12th September, 1967. The Appellate Bench granted the reliefs prayed for by the respondents. It is as against that decision these appeals have been brought after obtaining the necessary certificates from the High Court.

The only question that arises for decision in these appeals is whether on the facts set out in the show cause notices, which facts have to be assumed to be correct for the purpose of these proceedings, the respondents can be held to have contravened section 12 (1) which reads:

> " The Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air (hereinafter in this section referred to as export) of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless a declaration supported by such evidence as may be prescribed or specified, is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been, or will within the prescribed period be, paid in the prescribed manner."

On 4th August, 1947, the Central Government issued a notification prohibiting the export of all goods to any place outside India unless a declaration supported by such evidence as may be prescribed is furnished by the exporter to the prescribed authority that the amount representing the full export value of the goods has been or will within the prescribed period be, paid in the prescribed manner. Rule 3 of the Foreign Exchange Regulation Rules 1952 framed under section 27 of the Act provides that a declaration under section 12 of the Act shall be in one of the forms set out in the First Schedule as the Reserve Bank may by notification in the Official Gazette specify as appropriate to the requirements of a case. The form that is relevant for our present purpose is G. R. 1. Rule 5 empowers the Reserve Bank, the Collector of Customs or the postal authorities, to require the exporter to furnish such evidence in support of the declaration as may satisfy them that the exporter is a person resident in India or has a place of business in India. These authorities may also require the exporter to produce in support of the declaration such evidence as may be in his possession or power to satisfy them (*i*) that the destination stated on the declaration is the final place of destination of the goods exported; (*ii*) that the invoice value stated in the declaration is the full export value of the goods, and (*iii*) that the amount representing the full export value of the goods has been or will be paid to the exporter. Form G. R. 1 stipulates that the exporter should furnish the information called for therein. Therein the exporter is also required to make the following declaration:

> " I hereby declare that I am the seller/consignor of the goods in respect of which this declaration is made and that the particulars given above are true and (*a*) that the invoice value declared is the full export value of the goods and is the same as that contracted with the buyer; (*b*) that this is a fair valuation of the goods which are unsold.
>
> I/My principals undertake that I/they will deliver to the bank mentioned below the foreign exchange/rupee proceeds resulting from the export of these goods or before................"

It is not denied that the respondents before exporting the goods in question had furnished declarations in the prescribed forms. Therein they had declared that the full export value of the goods has been or will within the prescribed period be

paid in the prescribed manner. It is also not denied that they had furnished to the appropriate authorities the prescribed evidence. The case against them as mentioned earlier, is that they had under-invoiced the goods and failed to repatriate a portion of the foreign exchange earned by them. It is also alleged that they gave incorrect information in their declarations. If these allegations are correct which we have to assume to be correct for the purpose of this case, then it is obvious that the declarations given by the respondents do not comply with the requirements of rule 5.

Section 22 of the Act provides that no person when making an application or declaration to any authority or person for any purpose under the Act shall give any information or make any statement which he knows or has reasonable cause to believe to be false or not true, in any material particular. Section 23 prescribes that if any person contravenes the provisions of section 12 or of any rule, direction or order made thereunder he shall (*a*) be liable to such penalty not exceeding three times the value of the foreign exchange in respect of which the contravention has taken place, or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement in the manner provided in the Act or (*b*) upon conviction by a Court, be punishable with imprisonment for a term which may extend to two years, or with fine, or with both. In view of these provisions it was not disputed before us that if the information given by the respondents in the aforementioned declarations was false to the knowledge of those who made those declarations or if they had reasonable cause to believe that it was false or not true in any material particular then they are liable to be dealt with under section 23.

Sub-section (2) of section 12 provides that:

> "Where any export of goods has been made to which a notification under sub-section (1) applies, no person entitled to sell, or procure the sale of the sale goods shall, except with the permission of the Reserve Bank, do or refrain from doing anything or take or refrain from taking any action which has the effect of securing that :.......................................
>
> (*b*) payment for the goods is made otherwise than in the prescribed manner or does not represent the full amount payable by the foreign buyer in respect of the goods, subject to such deductions, if any, as may be allowed by the Reserve Bank, or is delayed to such extent as aforesaid."

The contravention of the above provisions is punishable under section 23. Hence the respondents' failure to repatriate any part of the foreign exchange earned by them by the sale of the manganese ore exported can be penalised by imposing on them a penalty not exceeding three times the value of the foreign exchange in respect of which the contravention had taken place or Rs. 5,000 which ever is more as may be adjudged by the Director of Enforcement in the manner provided in the Act. Hence it is open to the Director of Enforcement to levy on such of the respondents as have contravened section 12 (2) penalty not exceeding three times the value of the foreign exchange not repatriated which in the present case can be about nine crores of rupees. They may also be punished under section 23 (1) (*b*). This position is conceded by the Counsel appearing for the appellants. But it is urged on behalf of the appellants that for the offences committed by the respondents they are not only liable to be punished under section 23 but also under section 23 (A). The Appellate Bench of the Madras High Court negatived that contention. Section 23 (A) as it stood at the relevant time provided that:

> "Without prejudice to the provisions of section 23 or any other provision contained in this Act, the restrictions imposed by............sub-section (1) of section 12..........shall be deemed to have been imposed under section 19 of the Sea Customs Act 1878 and all provisions of that Act shall have effect accordingly, except that section 183, thereof shall have effect as if for the word "shall" therein the word 'may' were substituted."

If the allegations mentioned in the show cause notices come within the scope of section 23 (A) then it necessarily follows that they will be governed by the provisions

in section 19 and section 167 (8) of the Sea Customs Act, 1878. Section 19 of the Sea Customs Act provides:

> "that the Central Government may from time to time by notification in the official gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontiers as defined by the Central Government."

This section is similar to section 12 (1) of the Act. Section 167 (8) provides for punishments for offences under that Act. That section to the extent material for our present purpose reads:

> "The offences mentioned in the first column of the following schedule shall be punishable to the extend mentioned in the third column of the same with reference to such offences respectively:

Offences	*Sections of this Act to which offence has reference.*	*Penalties.*
1	2	3
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or	18 & 19	such goods shall be liable to confiscation; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.
if any attempt be made so to import or export any such goods; or		
if any such goods be found in any package produced to any officer of Customs as containing no such goods; or		
if any such goods, or any dutiable goods, be found either before or after landing or shipment to have been concealed in any manner on board of any vessel within the limits of any port in India; or		
if any goods, the exportation of which is prohibited or restricted as aforesaid, be brought to any wharf in order to be put on board of any vessel for exportation contrary to such prohibition or restriction.		

If an offence falls under section 23-A the fact that the said offence is also punishable under section 23 is immaterial. The provisions of section 23 (A) are without prejudice to the provisions of section 23. The mere fact that the offences alleged

against the respondents are punishable under section 23 would not exclude the application of section 23 (A). Therefore all that we have to see is whether those offences fall within the ambit of section 23 (A). If they do then the impugned show cause notices must be held to be valid. If they do not, then no proceeding can be taken on the basis of those notices.

Before a case can be held to fall within the scope of section 23 (A) it must be shown that there has been a contravention of the restrictions imposed by section 12 (1). Therefore we have to find out what those restrictions are? The only restriction placed by section 12 (1) read with the Central Government Notification dated 4th August, 1947, is that no one should export any goods from this country without furnishing the declaration mentioned in section 12 (1). Admittedly the stipulated declarations in the prescribed forms have been furnished. The evidence specified have also been given. Therefore *prima facie* there was no contravention of section 12 (1). What is said against the respondents is that the invoice price mentioned by them in the declarations did not represent the full export value; hence the declarations given by them are invalid declarations which means that the concerned goods were exported without furnishing the declaration required by section 12 (1). It is not possible to accept this argument. The declarations given do satisfy the requirements of section 12 (1) though they do not correctly furnish all the informations asked for in the form. Such declarations cannot be considered as non-est. The informations called for in the prescribed form cannot be considered as restrictions imposed by section 12 (1). They are merely informations called for the proper exercise of the powers under the Act. Many of them do not relate to the restrictions imposed by section 12 (1). Neither section 12 (1) nor any other provision in the Act empower the rule making authority to add to the restrictions imposted by section 12 (1). Foi finding out the restrictions imposed by section 12 (1) we have only to look to that section. The requirement of that section is satisfied if the stipulated declaration supported by the evidence prescribed or specified is furnished. The contravention complained of in this case is really the contravention of section 12 (2) and rule 5. The former is punishable under section 23 and the latter under section 23 read with section 22.

The declaration required by section 12 (1) is only to the effect that the amount representing the full export value of the goods has been or will within the prescribed period be, paid in the prescribed manner. This is as it should be because this section governs both the goods sold to the foreign buyers as well as those sent on consignment basis. So far as the goods sold to the foreign buyer are concerned it is generally possible for the exporter to know the exact value but that would not be the position when the goods are sent on consignment basis. In the case of goods sent on consignment basis, the exporter can give only an estimated value. The main purpose of section 12 (1) is to get a declaration from the exporter that he has either brought or will bring back the amount representing the full export value of the goods exported. There are other provisions in the Act to deal with other situations. We shall presently refer to them.

If we are to hold that every declaration which does not state accurately the full export value of the goods exported is a contravention of the restrictions imposed by section 12 (1) then all exports on consignment basis must be held to contravene the restrictions imposed by section 12 (1). Admittedly section 12 (1) governs every type of export. Again it is hard to believe that the Legislature intended that any minor mistake in giving the full export value should be penalised in the manner provided in section 23 (A). The wording of section 12 (1) does not support such a conclusion. Such a conclusion does not accord with the purpose of section 12 (1).

It is true that the regulations contained in the Act are enacted in the economic and financial interest of this country. The contravention of those regulations,

which we were told are widespread are affecting vital economic interest of this country. Therefore the rigour and sanctity of those regulations should be maintained but at the same time it should not be forgotten that section 12 (1) is a penal section. The true rule of construction of a section like section 12 (1) is, if we may say so with respect, as mentioned by Plowman, J. In Re *H. P. C. Productions Ltd.*[1]. Therein the learned Judge observed:

"I approach the question of the construction of the Exchange Control Act in the light of principles stated by Upjohn J. in *London and Country Commercial Properties Investments* v. *Attorney-General*[2] to which Mr. Bagnall referred. In that case the Court was concerned with the construction of the Borrowing (Control and Guarantees) Act 1946 and the Control of Borrowing Order 1947. Upjohn J. said: "the first question I have to consider is what are the principles of construction which I must adopt in construing this Act and this order......I have to bear in mind that this is a penal statute. It indeed, I suppose, represents the high water mark of the Parliamentary invasion of the traditional rights of the subjects of this realm." Then he went on to explain why that was so and continued; "In those circumstances what are the canons of construction to be adopted? I do not propose to refer to the authorities at length. I think that the proper approach to the construction of such a statute as this is that I must construe it as I would any other instrument, that is to say, I must look at all the surrounding circumstances, I must look at the mischief intended to be remedied, I must above all give effect to the words that have been used in the section. That is plain from the decision in *Dyke* v. *Elliot.*[3] see in particular, the judgment of James L.J. but if on construing the relevant sections of the Act and the order there appears any reasonable doubt or ambiguity then being a penal statute I must apply the principles laid down succinctly by Lord Esher in *Tuck and sons* v. *Priestar.*[4]"

In *London and North Eastern Rly. Co.* v. *Berriman*[5], Lord Macmillan observed :

"Where penalities for infringement are imposed it is not legiltimate to stretch the language of a rule, however beneficient its intention, beyond the fair and ordinary meaning of its language."

This Court in *Tolaram Relumal and another* v. *State of Bombay*[6], speaking through Mahajan, C.J. observed:

"It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature."

Hereinbefore we have examined the language of section 12 (1) and its purpose. We have also referred to the provisions which provide for the punishment of the contraventions complained of in these cases. Those provisions are adequate to meet the situation. In our opinion the language of section 12 (1) does not permit the acceptance of the interpretation placed on it by the appellants nor are we able to come to the conclusion that the Legislature intended that the offences complained of in these proceedings should be made punishable under section 23 (A). If the interpretation sought to be placed by the appellants on section 12 (1) is accepted it may result in unnecessary hardship in numerous cases.

There are two facets in every export, one relating to the goods exported and the other relating to the foreign exchange earned as a result of the export. Broadly speaking the former aspect is dealt with by the Customs authorities and the latter either by the Reserve Bank or by the Director of Enforcement. The price of goods exported has to be mentioned in the invoice. But the Reserve Bank has power to examine whether the price mentioned in the invoice is correct. Section 12 (5)

1. (1962) 1 All E.R. 31 : (1962) C.H.D.N. 466 at 473.
2. (1953) 1 All E.R. 436.
3. (1872) L.R. 4 P.C. 184, 191.
4. (1887) 19 Q.B.D. 629.
5. (1946) A.C.P. 286 at 295.
6. (1955) 1 S.C.R. 158 at p. 164 : (1954) S.C.J. 547.

provides that where in relation to any goods exported the value as stated in the invoice is less than the amount which in the opinion of the Reserve Bank represents the full export value of those goods, the Reserve Bank may issue an order requiring the person holding the shipping documents to retain possession thereof until such time as the exporter of the goods has made arrangements for the Reserve Bank or a person authorised by the Reserve Bank to receive on behalf of the exporter payment in the prescribed manner of an amount which represents in the opinion of the Reserve Bank the full export value of the goods. Sub-section (6) of section 12 says that for the purpose of ensuring compliance with the provisions of that section and any orders or directions made thereunder, the Reserve Bank may require any person making any export of goods to which a notification under sub-section (1) applies to exhibit contracts with his foreign buyer or other evidence to show that the full amount payable by the said buyer in respect of the goods have been or will within the prescribed period be paid in the prescribed manner. These provisions go to indicate that so far as the value of the goods exported is concerned the matter is left primarily in the hands of the Reserve Bank and the Customs authorities are not burdened with that work. This aspect becomes relevant in ascertaining the true scope of section 12 (1). If we bear in mind the scheme of the Act, it is clear that so far as the Customs authorities are concerned all that they have to see is that no goods are exported without furnishing the declaration prescribed under section 12 (1). Once that stage is passed the rest of the matter is left in the hands of the Reserve Bank and the Director of Enforcement.

In view of our above conclusion it is unnecessary for us to examine the other contentions advanced on behalf of the parties. In the result these appeals fail and they are dismissed with costs. One hearing fee.

ORDER

In accordance with the opinion of the majority, these appeals are dismissed with costs. One hearing fee.

V.M.K. *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI, G. K. MITTER, K. S. HEGDE AND A. N. GROVER, JJ.

Illias .. *Appellant**

v.

The Collector of Customs, Madras .. *Respondent.*

Behramji Merwanji Damania .. *Intervener.*

Customs Act (LII of 1962), *sections* 104, 105, 107 *and* 108, *Indian Evidence Act (I of* 1872), *section* 25 *and Criminal Procedure Code (V of* 1898), *Chapter XIV —Interpretation—" Police Officer", to be construed in a broad way—All officers having the powers of the police officer with respect to investigation of offences, whether they are called so or not—Customs officer invested with most of the powers exercised by the officer-in-charge of a police station when investigating a cognizable offence but not empowered to file a charge-sheet under section* 173, *Criminal Procedure Code—Customs Officer, if a " police officer."*

Sea Customs Act, (VIII of 1878), *sections* 171-*A and* 172.

The question for determination is whether the officers of the customs department who had recorded the statements must be deemed to be police officers and the statements being of a confessional nature were not admissible in evidence by virtue of the provisions of section 25 of the Indian Evidence Act.

Held that, in *State of Punjab* v. *Barkat Ram* (1962) 3 S.C.R. 338, it was held by the majority that customs officers were not police officers for the purpose of section 25 of the Evidence Act and the statements to customs officers were admissible in evidence at the trial of persons accused of offences, *inter alia* under the Sea Customs Act, 1878. The substantial difference, however, between the New and old Customs Acts relates to (1) the procedure after arrest; (2) the procedure for enquiry or investigation and (3) the procedure for search.

As regards the procedure after arrest a significant change which has been made in the new Act is contained in sub-section (3) of section 104. It is provided thereby that where an officer of customs has arrested any person under sub-section (1) he shall, for the purpose of releasing such person, on bail or otherwise have the same power and be subject to the same provisions as the officer-in-charge of a police station has and is subject to under the Code of Criminal Procedure. Sub-section (4), however, makes an offence under the new Act non-cognizable notwithstanding anything contained in the Code of Criminal Procedure (the offences under the old Act were also non-cognizable). In the old Act there was no provision conferring the power of releasing a person on bail or otherwise on a customs officer of and only a magistrate could grant bail.

In the old Act the provisions containing the procedure for enquiry were to be found in section 171-A. Any officer of customs duly employed in the prevention of smuggling had the power to summon any person whose attendance he considered necessary either to tender evidence or to produce a document in any enquiry which such officer was making in connection with smuggling of goods. Any person so summoned was bound to attend either in person or by an authorised agent and he was also bound to state the truth upon

* Cr. A. No. 45 of 1967 31st October, 1968.

any subject respecting which he was examined or make a statement and to produce such documents and other things as might be required. Every such enquiry was by a deeming provision to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code. Under the new Act the enquiry can be of two kinds. Under section 107 any officer of customs empowered by the Collector of Customs can require any person to produce or deliver any document, etc., or he can examine any person acquainted with the facts and circumstances of the case. Section 108 contains the second set of powers which are analogous to section 171-A of the old Act, the two sections being almost similar in language.

As regards the procedure for search the important change which has been made in the new Act is that under section 105 if the Assistant Collector of Customs has reason to believe that any goods liable to confiscation or any documents or things are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things. Under the old Act it was necessary to obtain a warrant from a magistrate in accordance with section 172 and the warrant could be executed in the same way and had the same effect as a search warrant issued under the law relating to criminal procedure.

The words "police officers" in section 25 of the Evidence Act must be construed in a broad way and all officers would be police officers within the meaning of those words if they had the powers of the police officer with respect to investigation of offence with which they were concerned even if they were police officers properly so called or not.

The ratio of the decision in *Badku Joti Savant case*, (1967) M.L.J. (Crl.) 36: (1966) 3 S. C. R. 698, is that even if an officer under the Special Act has been invested with most of the powers which an officer-in-charge of a police station exercise when investigating a cognizable offence he does not thereby became a police officer within the meaning of section 25 of the Evidence Act unless he is empowered to file a charge-sheet under section 173 of the Code of Criminal Procedure. It is difficult and indeed it would be contrary to all rules of interpretation to spell out any such special power from any of the provision contained in the new Act. In this view of the matter even though under the new Act a customs officer has been invested with many powers which were not to be found in the provisions of the old Act, he cannot be regarded as a police officer within the meaning of section 25 of the Evidence Act. Customs Officer is under the Act of 1962 not a police officer within the meaning of section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by section 25 of the Indian Evidence Act.

Appeal by Special Leave from the Judgment and Order dated the 9th September, 1966 of the Madras High Court in Criminal Revision Petition No. 1350 of 1965.

N. H. Hingorani, R. Jethmalani and *Mrs. K Hingorani*, Advocates for Appellant.

Niren De, Solicitor-General of India and *N. S. Bindra*, Senior Advocate, (*R. H. Dhebar* and *S. P. Nayar*, Advocates with him), for Respondent.

K. R. Chaudhuri and *K. Rajendra Chaudhuri*, Advocates for Intervener.

The Judgment of the Court was delivered by

Grover, J.—The main point in this appeal, by Special Leave, is whether the statements of the appellant and other accused persons recorded by the customs

authorities under the provisions of the Customs Act (LII of 1962), hereinafter called the New Act, were admissible in evidence at their trial for the alleged offences under section 120-B of the Indian Penal Code read with section 135 of the New Act and sections 23 (1-A) and 23-B of the Foreign Exchange Regulation Act, 1947 and under Rule 131-B of the Defence of India Rules.

The facts need not be stated in great detail. A complaint was laid by the Collector of Customs, Madras, against 10 persons for having committed the above offences. The complaint related to an occurrence which involved transport of 750 bars of gold each weighing 10 tolas valued at more than 7 lakhs from Bombay to Madras. The statements of the accused persons were recorded by the Inspector of Customs and other customs authorities before the complaint was filed. After a preliminary enquiry the Second Presidency Magistrate, George town, Madras committed 9 of the accused persons to stand their trial at the City Sessions Court, the charges being confined to the transaction connected with 700 bars of gold only. Seventeen charges were framed on 29th October, 1965, by the learned Sessions Judge against the appellant and eight other accused persons for the various offences mentioned above. When the hearing before the Sessions Court commenced the prosecution sought to file the statements of the accused persons recorded by the customs authorities. Certain preliminary objections were raised on behalf of the accused to the admissibility of those statements. The first was that the officers of the customs department who had recorded the statements must be deemed to be police officers and the statements being of a confessional nature were not admissible in evidence by virtue of the provisions of section 25 of the Indian Evidence Act. The second objection was that the investigation conducted by the customs officer must be deemed to be under Chapter XIV read with section 5 (2) of the Criminal Procedure Code and the statements thus became inadmissible under section 161 read with section 162 of the Code. The third objection was based on Article 20 (3) of the Constitution involving testimonial compulsion. This objection was not mentioned in the order of the learned Sessions Judge but it was alleged to be raised before the High Court. The matter went up to the High Court on the Revisional side because the learned Sessions Judge took the view that the statements given by the accused persons to the customs officers could not be received in evidence. The learned Single Judge, who heard the Revision petition, referred the following questions to a Full Bench owing to their importance:

"Are statement recorded by enquiring officers of the Customs Department under section 107 (108) of the Customs Act, 1962, inadmissible in evidence in criminal trial by reason of the bar under: (1) section 25 of the Indian Evidence Act; (2) section 162 of the Criminal Procedure Code; and (3) Article 20 (3) of the Constitution."

The Full Bench answered all the three questions against the accused persons. Only one out of them, Illias, has appealed to this Court.

Learned Counsel for the appellant has not pressed the second point. As regards the third point, it was conceded before the Full Bench of the High Court that when the statements were recorded the investigation had not reached the stage when the particular persons had been accused of an offence within the meaning of Article 20 (3) of the Constitution. In view of this concession learned Counsel for the appellant has submitted that the matter be left undecided so that it may be open to the appellant to make whatever submissions he wishes to make before the trial Court when any such statement is formally tendered for admission into evidence.

Adverting to the first point the main endeavour of the Counsel for the appellant has been to demonstrate by reference to various provisions of the new Act

that statements recorded by the customs authorities of a confessional nature would be hit by the provisions of section 25 of the Evidence Act. In *State of Punjab* v. *Barkat Ram*[1], it was held by the majority that customs officers were not police officers for the purpose of section 25 of the Evidence Act and the statements to customs officers were admissible in evidence at the trial of persons accused of offences, *inter alia,* under the Sea Customs Act, 1878, hereinafter called the "old Act." It has been submitted that a later decision of this Court in *Raja Ram Jaiswal* v. *State of Bihar*[2] which related to the question whether an Excise Inspector exercising powers under the Bihar and Orissa Excise Act was a police officer for the purposes of section 25 of the Evidence Act goes a great deal in favour of the appellant particularly when the provisions of the new Act wherein substantial departure has been made from those of the old Act are kept in view. As will be presently seen there is yet a third decision of the constitution bench of this Court in *Badku Joti Savant* v. *State of Mysore*[3] which related to the provisions of the Central Excises and Salt Act which goes against the contention passed by the Counsel for the appellant. At any rate it does not appear that the majority view expressed in *Barkat Ram's case*[1] has been shaken in any manner so far as statements recorded by a customs officer under the old Act are concerned. Indeed in a recent decision of this Court *P. Shankar Lal and others* v. *Assistant Collector of Customs, Madras*[4] it has been reaffirmed that there is no conflict between the cases of *Raja Ram Jaiswal*[4] and *Barkat Ram*[1], the former being distinguishable from the latter.

Before the previous pronouncements of this Court are discussed it is necessary to compare the relevant provisions of the new Act and the old Act.

Under the old Act section 173 provided that persons reasonably suspected of offences under that Act might be arrested by any officer of Customs or other persons duly employed for the prevention of smuggling. Under the new Act according to section 104 if an officer of customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person has been guilty of an offence punishable under section 135, he may arrest such person. As regards the power to search, Chapter XVII of the old Act contained the relevant provisions. Section 169 conferred the power on a customs officer to search, on a reasonable suspicion. Under section 170 when any officer of customs was about to search any person under the provisions of section 169 such persons could require that officer to take him, previous to search before the nearest magistrate or customs-collector. Section 172 conferred power on a magistrate to issue search warrants on an application by the customs-collector. In the new Act, section 100 confers the power to search suspected persons entering or leaving India. Section 102 contains provision analogous to section 170 of the old Act with some minor differences. Under the old Act every person arrested on the ground that he had been guilty of an offence under that Act had to be forthwith taken to the nearest magistrate or customs-collector, (section 174). Under the new Act, section 104 (2) provides that every person arrested shall, without unnecessary delay, be taken to a magistrate. Lastly section 171-A of the old Act conferred power on customs officers to summon persons to give evidence and produce documents. Under the new Act section 107 gives the power to customs officers empowered by general or special order of Collector of Customs, to examine persons acquainted with the facts and circumstances of the case or to

1. (1962) 3 S.C.R. 338.
2. (1964) 2 S.C.R. 752.
3. (1967) M.L.J. (Crl.) 36: (1967) 1 S.C.J. 701 : (1966) 3 S.C.R 698.
4. Cr. A. Nos. 52 & 104 of 1965 decided on 12-12-1967.

require any person to produce or deliver any document. Section 108 confers power on a Gazetted Officer of customs to summon persons for giving evidence or producing documents.

The substantial difference, however, between the two enactments as has been pointed out by the High Court relates to (1) the procedure after arrest; (2) the procedure for enquiry or investigation and (3) the procedure for search.

As regards the procedure after arrest a significant change which has been made in the new Act is contained in sub-section (3) of section 104. It is provided thereby that where an officer of customs has arrested any person under sub-section (1) he shall, for the purpose of releasing such person, on bail or otherwise have the same power and be subject to the same provisions as the officer-in-charge of a Police Station has and is subject to under the Code of Criminal Procedure. Sub-section (4), however makes an offence under the new Act non-cognizable notwithstanding anything contained in the Code of Criminal Procedure (the offences under the old Act were also non-cognizable). In the old Act there was no provision conferring the power of releasing a person on bail or otherwise on a Customs Officer and only a magistrate could grant bail. A great deal of emphasis has been laid by the Counsel for the appellant on the power of granting bail which has now been given to a customs officer under the new Act. It is pointed out that such a power goes a long way and assists a great deal in extortion of confessions against which section 25 of the Evidence Act contains the main safeguards. It has also been contended that all the powers of an officer-in-charge of the police station under the Code of Criminal Procedure have been conferred on an officer of customs in the matter of releasing an arrested person on bail or otherwise. It has even been suggested by the appellant's Counsel that the word "otherwise" invests the customs officer with all the powers which an officer-in-charge of a police station can exercise under Chapter XIV of the Code. It may be observed at once that the word "otherwise" clearly relates to relating a person who has been arrested and cannot possibly be construed in the manner suggested by the learned Counsel.

In the old Act the provisions containing the procedure for enquiry were to be found in section 171-A. As stated before, any officer of customs duly employed in the prevention of smuggling had the power to summon any person whose attendance he considered necessary either to tender evidence or to produce a document in any enquiry which such officer was making in connection with smuggling of goods. Any person so summoned was bound to attend either in person or by an authorised agent and he was also bound to state the truth upon any subject respecting which he was examined or make a statement and to produce such documents and other things as might be required. Every such enquiry was by a deeming provision to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code. Under the new Act the enquiry can be of two kinds. Under section 107 any officer of customs empowered by the Collector of Customs can require any person to produce or deliver any document, etc., or he can examine any person acquainted with the facts and circumstances of the case. Section 108 contains the second set of powers which are analogous to section 171-A of the old Act, the two sections being almost similar in language. The contention on behalf of the appellant is that section 107 of the new Act gives power of investigation to officers of customs similar to those exercisable by a police officer under Chapter XIV of the Criminal Procedure Code. Now a Police officer under section 160 of the Code can, by an order in writing, require the attendance of any person within the limits of his own or any adjoining station and he can under section 161 examine orally any person supposed to be acquainted with the facts and circumstances of the case. The submission of the appellant's Counsel

therefore is that section 107 is similar to sections 160 and 161 and the customs officer conducting an enquiry or investigation relating to offences under the new Act enjoys the same power as a police officer making an investigation under Chapter XIV of the Code of Criminal Procedure. It is pointed out that under the old Act no such powers were conferred on the customs officer and it was with reference to section 171-A of the old Act that this Court in *Barkat Ram's case*[1] laid emphasis on the judicial nature of the proceedings held under that section. The distinction, it is said, no longer obtains owing to the provisions of section 107 of the new Act.

As regards the procedure for search the important change which has been made in the new Act is that under section 105 if the Assistant Collector of customs has reason to believe that any goods liable to confiscation or any documents or things are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things. Under the old Act it was necessary to obtain a warrant from a magistrate in accordance with section 172 and the warrant could be executed in the same way and had the same effect as a search warrant issued under the law relating to criminal procedure.'

An examination of the previous decisions of this Court may now be made in order to test the validity of the argument raised on behalf of the appellant that owing to the substantial changes made in the new Act statements of a confessional nature recorded by the customs officers should be excluded under section 25 of the Evidence Act on the ground that these officers are police officers within the meaning of that section. In the majority judgment in *Barkat Ram's case*[1] a comparison was made between the duties and powers of police officers and customs officers which may be summarised as follows:

(1) The police is the instrument for the prevention and detection of crime which can be said to be the main object of having the police. The powers of customs officers are really not for such purpose and are meant for checking the smuggling of goods and due realization of customs duties and for determining the action to be taken in the interest of the revenue country by way of confiscation of goods on which no duty had been paid and by imposing penalties and fines.

(2) The customs staff has merely to make a report in relation to offences which are to be dealt with by a magistrate. The Customs Officer, therefore, is not primarily concerned with the detection and punishment of crime but he is merely interested in the detection and prevention of smuggling of goods and safeguarding the recovery of customs duties.

(3) The powers of the search, etc., conferred on the Customs Officers are of a limited character and have a limited object of safeguarding the revenues of the State and the statute itself refers to police officers in contradiction to Customs Officers.

(4) If a customs officer takes evidence under section 171-A and there is an admission of guilt, it will be too much to say that that statement is a confession to a police officer as a police officer never acts judicially and no proceeding before him is deemed to be a judicial proceeding for the purpose of sections 193 and 228 of the Indian Penal Code or for any other purpose.

Adverting to *Raja Ram Jaiswal's case*[2], it is significant that by virtue of section 77 (2) read with section 78 (3) of the Bihar and Orissa Excise Act, 1915, an Inspector or Sub-Inspector was deemed to be an officer-in-charge of a police station and was entitled to investigate any offence under the Excise Act. He could exercise all the powers which an officer-in-charge of a police station could

1. (1962) 3 S.C.R. 338 2. (1964) 2 S.C.R. 752.

exercise under Chapter XIV of the Code. It was therefore held by the majority that a confession recorded by an Excise Officer during an investigation into an excise offence could not reasonably be regarded as anything different from a confession to a police officer. *Barkat Ram's case*[1] was distinguished on a number of grounds. One was that the Excise Officer did not exercise any judicial power just as the Customs Officer did under the Sea Customs Act, 1878; secondly the Customs Officer was not deemed to be an officer-in-charge of a police station and therefore he could not exercise powers of such an officer under the Code of Criminal Procedure. Further the customs officer could make an enquiry but he had no power to investigate into an offence under section 156 of the Code. Even though some of the powers set out in Chapter XVII of the Sea Customs Act were analogous to those of the police officer under the Code, they were not identical with those of a police officer and were not derived from or by reference to the Code. It was pertinently that the Customs Officer was not entitled to submit a report to a magistrate under section 190 of the Code with a view that cognizance of the offence be taken by a magistrate. It was then said at page 766:

"The test for determining whether such a person is a "police officer" for the purpose of section 25 of the Evidence Act would, in our judgment, be whether the powers of a police officer which are conferred on him or which are exercisable by him because he is deemed to be an officer in charge of a police station establish a direct or substantial relationship with the prohibition enacted by section 25, that is, the recording of a confession. In our words, the test would be whether the powers are such as would tend to facilitate the obtaining by him of a confession from a suspect or a delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed or the question as to what other powers he enjoys."

Emphasis was laid on the police officers having such powers which enable them to exercise a kind of authority over the persons arrested which facilitate the obtaining from them statements which may be of incriminating nature. The case of *Raja Ram Jaiswal*[1] came up for discussion in the third of series of those of these cases, namely, *Badku Joti Savant* v. *State of Mysore*[2] The appellant there had been found in possession of contraband gold. He was prosecuted under section 167 (81) of the Sea Customs Act read with section 9 of the Land Customs Act. A question arose whether the statement made by the appellant to the Deputy Superintendent of Customs and Excise was admissible in evidence. The contention raised was that the Central Excise Officer under the Central Excises and Salt Act, (I of 1944), hereinafter called the "Central Excise Act", was a police officer within the meaning of those words in section 25 of the Evidence Act. Therefore even though the Deputy Superintendent of Customs and Central Excise had acted under the power conferred on him by the Sea Customs Act, he was still a police officer and the statement made to him which was in the nature of a confession was inadmissible in evidence. This Court referred to the difference of opinion among the High Courts as to the meaning of the words "police officer" used in section 25 of the Evidence Act. One view was that those words must be construed in a broad way and all officers would be police officers within the meaning of those words if they had the powers of the police officer with respect to investigation of offences with which they were concerned even if they were police officers properly so called or not. The narrow view was that these words in section 25 meant a police officer properly so called and did not include officers of other departments of Government

1. (1962) 3 S.C.R. 338.
2. (1964) 2 S.C.R. 752.
3. (1967) M.L.J. (Crl.) 36

who might be charged with the duty to investigate, under special Acts, special crimes like the excise or customs offences, etc. The Court proceeded on the assumption that the broad view was correct. After examining the various provisions of the Central Excise Act and in particular section 21 it was observed that a police officer for the purpose of Clause (*b*) of section 190 of the Code of Criminal Procedure could only be one properly so called. A Central Excise Officer had to make a complaint under Clause (1) of section 190 of the Code to a magistrate to enable him to take cognizance of an offence committed under the special statute. The argument that a Central Excise Officer under section 21 (2) of the Central Excise Act had all the powers of an officer-in-charge of a police station under Chapter XIV of the Code and therefore he must be considered to be a police officer within the meaning of those words in section 25 of the Evidence Act was repelled for the reason that though such officer had the power of an officer-in-charge of a police station he did not have the power to submit a charge-sheet under section 173 of the Code. *Raja Ram Jaiswal's case*[1] was distinguished on the ground that section 21 of the Central Excise Act was in terms different from section 78 (3) of the Bihar and Orissa Excise Act, 1915 which provided that for the purpose of section 156 of the Code of Criminal Procedure the Excise Officer empowered under section 77 (2) of that Act shall be deemed to be the officer-in-charge of a police station. The following observations at page 704 are indeed important:

"All that section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer-in-charge of a police station when investigating a cognizable case. But even so it appears that these powers do not include the power to submit a charge-sheet under section 173 of the Code of Criminal Procedure, for unlike the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer-in-charge of a police station."

It was reiterated that the appellant could not take advantage of the decision in *Raja Ram Jaiswal's case*[1] and that *Barkat Ram's case*[2] was more apposite. The ratio of the decision in *Badku Joti Savant*[3] is that even if an officer under the speical Act has been invested with most of the powers which an officer-in-charge of a police station exercises when investigating a cognizable offence he does not thereby became a police officer within the meaning of section 25 of the Evidence Act unless he is empowered to file a charge-sheet under section 173 of the Code of Criminal Procedure.

Learned Counsel for the appellant when faced with the above difficulty has gone to the extent of suggesting that by necessary implication the power to file a charge-sheet flows from some of the powers which have already been discussed under the new Act and that a customs officer is entitled to exercise even this power. It is difficult and indeed it would be contrary to all rules of interpretation to spell out any such special power from any of the provisions contained in the new Act. In this view of the matter even though under the new Act a customs officer has been invested with many powers which were not to be found in the provisions of the old Act, he cannot be regarded as a police officer within the meaning of section 25 of the Evidence Act. In two recent decisions of this Court in which the judgments were delivered only on 18th October, 1968, *i e*. *Romesh Chandra Mehta* v. *State of West Bengal*[4] and *Dady Adarji Fatkia* v. *K. K. Ganguly, Assistant Collector of Customs and another*[5] the view expressed in *Barkat Ram's case*[2] with reference to the old Act has been reaffirmed on the

1. (1964) 2 S C R 752.
2 (1962) 3 S C R 338.
3. (1967) M L J. (Crl) 36.
4. Cr.A No. 27 of 1967.
5. Cr.A. No. 46 of 1968.

question under consideration and it has been held that under the new Act also the position remains the same. This is what has been said in *Dady Adarji Fatkia's case*[1] :

"For reasons set out in the judgment in *Romesh Chand Mehta* v. *State of West Bengal*[2] and the judgment of this Court in *Badku Joti Savant's case*[3], we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by section 25 of the Indian Evidence Act."

This appeal fails and it is dismissed.

V.M K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. M. SHELAT, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

The Workmen of Shri Bajrang Jute Mills Ltd. .. *Appellants**

v.

The Employers of Shri Bajrang Jute Mills Ltd. .. *Respondents.*

Industrial Dispute—Wage structure in the industry, determination of—Wage structure to be based on the principles of fair wages payable in the industry—Capacity of the industry to pay to be gauged on an industry-cum-*region basis, after taking a fair cross—Section of that industry—In a given case permissible to divide the industry into appropriate classes and then to deal with the capacity of the industry to pay class-wise.*

Industrial Dispute—Wage structure in the jute industry—Wage Board—Uniform wage scales for the entire industry—Selection of 20 miles from West Bengal and 9 reporting mills from other regions as representing a cross-section of the industry and treating cotton textile concerns in West Bengal as comparable to those in jute industry and treating the former as comparable to those outside—Determination of uniform wage scales by clubbing the mills together in disregard of conditions prevailing in the mills in different regions, if suffers from an inherent infirmity.

The approach of the Wage Board to determine uniform wage scales for the entire industry must suffer from an inherent weakness. Conditions, such as easy access to raw materials, transport, nearness of markets for disposal of the manufactured product, availability of labour, the type of market whether within or outside the country for which the manufactured articles are intended and diverse other factors must vary from region to region. Likewise, economic conditions affecting the consumer prices must and do differ, as is well-known, from region to region, depending largely upon whether a particular region is self-sufficient or not in the elemental needs of its citizens and these in turn are bound to affect living standards. It would therefore be too artificial and unrealistic an approach to be oblivious of these differences and to attempt to group together all establishments and factories and device common wage-scales applicable to all of them disregarding the peculiar features of the industry in a particular region. Favourable conditions prevailing in one region would place industrial concerns there in a position better than those in

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1. Cr.A No. 46 of 1968.
2. Cr.A No. 27 of 1967.
3. (1967) M.L.J. (Crl.) 36.

* C.A.No. 923 of 1966 31st October, 1968.

other regions where such conditions do not occur. Similarly, in regions where consumer prices are lower, labour would be better off than in the rest of the regions where the living index is higher; yet, the wage scales would be the same in all the regions. Uniformity of wage-scales, irrespective of differences in conditions would place both the employees and the employers in regions where such favourable conditions prevail in an unfairly advantageous position over the employees and employers in the other regions. Instead of attaining harmony there would as a result arise inevitably a feeling of discrimination. Though, as laid down in *Express Newspapers case* (1959) S.C.R. 12: (1958) S.C.J. 113. It may not be possible or even necessary for Wage Board to scrutinise all the establishments separately and it would be enough to take a representative cross-section of the industry for assessment, the cross-section to be a truly representative one and capable of giving a true picture of the conditions of both the industry and labour must be one from each region where establishments of the industry in question are situate.

What the Wage Board, however, did was that instead of proceeding region-wise and selecting a representative cross-section from each region, it selected 20 mills from West Bengal and clubbed them with 9 reporting mills from the rest of the regions, *viz*., Bihar, U. P., Madhya Pradesh and Andhra Pradesh where a few mills are scattered. The Board considered these 29 mills as representing a cross-section of the industry. It is obvious that these mills so clubbed together could not truly reflect the economic and other conditions prevailing in the mills in different regions with their peculiar problems and differing conditions. That was not a proper approach and was bound to result in injustice especially in view of the peculiar feature of the jute industry that it is predominantly concentrated in West Bengal and is export-oriented. Besides, the jute industry in the other regions suffers from a distinct disadvantage as the raw materials have to be transported from a distance at considerable cost.

Another difficulty in accepting the Wage Board's recommendations arises from the fact that the Board equated the cotton textile industry in West Bengal with the jute industry there and finding the wage-scales in the jute industry lower than those in the cotton textile industry, the Board raised the scales in the jute industry so as to bring them to the level of the cotton textile industry. Having so done, the next step which the Wage Board took was to raise also the wage-scales in mills outside West Bengal to bring them in line with the scales proposed by it for the mills in West Bengal. This process gave rise to two infirmities: (*i*) that the Board treated cotton textile concerns in West Bengal as comparable to those in jute industry; and (*ii*) it treated the jute mills in West Bengal as comparable to those outside, although conditions in the different regions where they were situate were obviously different. This meant that the Board gave a go-by to the well-established principle of industry-*cum* region consistently applied by Industrial Tribunals whenever wage-scales had to be determined.

The claim of the respondent that the recurring expenditure for implementation of the recommendation of the Wage Board is over Rs. 3,75,000, and that it has not the financial capacity to bear this burden, has been accepted by the Industrial Tribunal and that finding has not been challenged. The respondent mill, which has only 120 looms, has been compared with the two big mills in Andhra Pradesh, *viz*., Nellimarla and Chittavalsa, having 326 and 500 looms respectively, as also with very large mills in West Bengal, some of whose loom capacity is more than 2,000. That clearly shows that all mills, small as well as large, economic as well as uneconomic, have been clubbed together and treated alike by the Wage Board.

The various aspects, dealt with above, establish that the essential prerequisite of deciding the wage structure, *viz.*, to consider the capacity of the industry to pay on the principles laid down by this Court, is absent in the recommendations of the Wage Board and that introduces a fatal industry in its decision.

Appeal by Special Leave from the Award dated the 29th May, 1965 of the Industrial Tribunal, Andhra Pradesh in I. D. No. 12 of 1964.

M. K. Ramamurthi, Mrs. Shyamala Pappu and *Vineat Kumar*, Advocates, for Appellants.

K. Srinivasamurthy, Naunit Lal and *B. P. Singh*, Advoootes, for Respondents.

The Judgment of the Court was delivered by

Vaidialingam, J.—The workmen of Shri Bajrang Jute Mills Ltd., in this appeal by Special Leave, attack the correctness of the award dated 29th May, 1965 of the Industrial Tribunal, Andhra Pradesh, Hyderabad, I.D. No. 12 of 1964, by which it held that the demand of the workmen for implementation of the recommendations of the Central Wage Board for Jute Industry (hereinafter referred to as the Wage Board), was not justified.

In view of the fact that the respondent-management declined to accede to the demand of the appellants to pay wages in accordance with the recommendations of the Wage Board, the State of Andhra Pradesh, by its order dated 21st March, 1964, referred for adjudication to the Industrial Tribunal, Hyderabad, the following question :

"Whether the demand of the workmen in Sri Bajrang Jute Mills, Limited, Guntur, for implementation of the recommendations of the Central Wage Board for Jute Industry is justified, and if so, to what extent ?"

The Wage Board was constituted by the Central Government for determining among other matters, a wage structure, based on the principles of fair wages payable in the jute industry. The Wage Board consisted of a Chairman, two independent Members, two Members representing the employers and two Members representing the workers. It may be noted that the Members representing the industry and labour were not chosen by the representative bodies of the industry or the labour but were appointed by Government. In fact, neither the industry nor the labour had any voice in the choice by the Government of any of the members of the Wage Board. The Wage Board submitted its report to the Government, making recommendations about the wage structure and laying down principles for awarding bonus for the year 1962-63 and the subsequent years.

It appears from the Wage Board's report that, at the very outset, the Wage Board selected 20 mills from West Bengal and 9 reporting mills from outside West Bengal which it considered to form a representative cross-section of the industry for detailed study. The Wage Board took into account the financial position of the said mills and also collected other data and information not only from the mills concerned but also from other quarters. The Wage Board took into account the growth of paid-up capital, gross block depreciation, profits made and dividends paid by the mills and other allied matters and came to the conclusion that the industry's position was satisfactory and its future was bright. The Wage Board was not required to fix a wage structure on the peculiar financial position of any particular unit, although it was bound to take a fair cross-section of the industry represented by units reflecting the general conditions prevailing in the industry as a whole. The Wage Board also considered the principles for determination of bonus and recommended payment of bonus for the year 1963

on the basis of the basic wages drawn by the worker for the year 1962. It also recommended that for future years the bonus was to be paid according to the wages drawn in the preceding year. It further recommended certain rules for determination of the quantum of bonus. According to the appellants, the respondent was bound to implement the recommendations of the Wage Board in all respects and its refusal to do so was illegal and unjustified.

The respondent pleaded that the recommendations of the Wage Board could not be implemented as the Mill had no financial capacity to bear the burden of the wage scales recommended by the Wage Board. The respondent made an attempt to implement the Wage Board's recommendations to some extent at least, provided the labour agreed for revision of work loads, but the labour was not willing for such revision. It was further stated that the respondent company, though started in 1907, had been running at a loss for a number of years and its loom-strength was only 120. The mill was located at Guntur, which is not a jute-growing area, and in consequence almost all raw materials had to be brought from Vijayanagaram, in Vishakapatnam District, and from Calcutta. As the raw materials and other products had to be brought from outside, it involved the mill in considerable expense due to freight charges, etc. The products manufactured in the mill were only cement bags and twine and cement companies were its only customers. The company had furnished replies to the questionnaire issued by the Wage Board and had made it clear that the wages paid by it were reasonable and it could not bear any additional burden in that regard. Even the interim relief, recommended by the Wage Board, was implemented with considerable difficulty though it involved the company in an additional revenue expenditure of Rs. 1,53,000 a year.

The Wage Board's recommendations fixed the wage scales, dearness allowance, etc., for all the employees working in all the jute mills situated in the country, irrespective of the finncial position of individual mills. If the recommendations of the Wage Board were to be implemented, the company would be put to further expenditure of Rs. 2,75,385.60 in the first year, Rs. 3.25 lakhs in the second year and Rs. 3.75 lakhs in the third year in addition to the existing wage bill which the company had to meet. The company has been making only negligible profits and it could not pay any dividend on its equity shares for nearly 7 years. Its reserves also have been dwindling. The financial position of the company therefore, is such that it is impossible for it to bear the burden of the additional wage structure, dearness allowance, etc., as recommended by the Wage Board. The company further pleaded that the Wage Board committed a serious mistake when it compared the financial position of the respondent along with two other large mills in the Andhra area, *viz.*, Nellimarla and Chittavalsa Jute Mills. Further the wage scales fixed by the Wage Board are on the basis of the position occupied by big jute mills in West Bengal, having upto 2.561 looms and 13,580 spindles. The Wage Board did not attempt to make any distinction between small and uneconomic mills and large mills, nor was any classification made in that manner.

Regarding payment of bonus, the company pleaded that this was covered by a settlement and the workmen were not entitled to the same in view of the financial position of the company and as there was no available surplus. The wage structure, dearness allowance, etc., fixed by the Wage Board were not in accordance with the principles laid down by this Court in several decisions. According to the decisions of this Court, no fair wage can be fixed unless the unit in question has the financial capacity to meet the additional burden; and, in fixing the wage scale and dearness allowance, the principle of industry-*cum* region has to be applied. Small and struggling units should not be compared

with large, flourishing concerns. The extent of business carried on by them, the labour force, the capital invested, quantum of reserves, dividends declared and profits made, have all to be taken into account to see whether the units could be compared for wage fixation. All these circumstances have not been given due weight and consideration by the Wage Board. The respondent mill has only 120 looms and it has been compared with not only the very big mills in West Bengal but also with the Nellimarla and Chittavalasa Jute Mills which have 500 and 316 looms respectively. No classification was made by the Wage Board of the various jute mills as large, medium and small units; and in prescribing uniform scales for all types of units no distinction has been made between economic and uneconomic units. Small and struggling units have been treated in the same way as large and prosperous units. Finally, the respondents pleaded that in view of the circumstances indicated above, the Wage Board's recommendations could not be implemented by it and the labour's claims, on the basis of the Wage Board's recommendations, were not justified.

The Industrial Tribunal, in its award under attack, accepted the pleas taken by the management. While recognising the fact that the Wage Board's recommendations were made, after collecting considerable data, the Tribunal was of the view that the Wage Board committed an error in comparing the respondent mill with other big mills, not only in Andhra Pradesh but also outside that State. The Tribunal was also of the view that the principles laid down by this Court that the fixation of wage scales should be on an industry-*cum*-region basis and that small units should not be compared with large and flourishing concerns, were not given due regard by the Wage Board. On the materials placed before it, the Tribunal accepted the claim of the respondent that it was a small concern considered from any point of view, *viz.*, of looms, paid up capital, reserves, or the profits. In respect of the capacity to pay, the Tribunal was of the view that the Wage Board had not approached the question in the light of the principles laid down by this Court. The Tribunal came to the conclusion that the respondent, which is a fairly small unit, has not the financial capacity to adopt the wage-structure fixed by the Wage Board. The Tribunal accepted the claim of the respondent regarding the additional financial burden it would have to bear, even according to the phased programme fixed by the Wage Board and has held that the financial position of the company is such that it cannot bear this burden. The Tribunal also came to the conclusion that as the Wage Board was devising a fair wage, the capacity of the particular industry to bear the additional burden—which is one of the essential circumstances to be taken into consideration—has not been taken into account. On the other hand, all jute mills, wherever situate, big or small, prosperous or struggling, economic or uneconomic, have all been treated alike and a uniform wage structure applicable to all mills has been fixed. There has been no attempt at classification of small and uneconomic mills for the purpose of finding out their financial capacity. The Tribunal finally came to the conclusion that the demand of the workmen for implementation of the recommendations of the Wage Board was not justified.

The same stand, taken before the Tribunal by the management and the workmen, as mentioned earlier, have been reiterated before us by Mr. M. K. Ramamurthy, learned Counsel for the union, attacking the award and Mr. K. Srinivasamurthy, learned Counsel for the management, in support of the award. Before we refer to the circumstances under which the Wage Board was constituted, as well as the approach made by it in the fixation of wage-scales and other matters, it is necessary to refer to the principles laid down by this Court in that regard and to examine whether the Wage Board has properly applied those principles. Mr. Ramamurthy, learned Counsel for the appellant,

has accepted the position that there is an obligation on the Wage Board to follow correctly and apply the principles laid down by this Court in the matter of fixation of wages and dearness allowance. But his contention is that the Wage Board has, in its recommendations, followed those principles.

In *Express Newspapers (Private) Ltd.* v. *The Union of India*[1] this Court has elaborately considered the concept of (*i*) living wage; (*ii*) fair wage; and (*iii*) minimum wage, as well as the machinery for fixation of wages, adopted in various countries. So it is not necessary to cover the ground over again. So far as fair wage is concerned, this Court has stated that while the lower limit must obviously be the minimum wage, the upper limit is equally said to be what may broadly be called the 'capacity of the industry to pay'. It has further been stated that the capacity of the industry to pay should be gauged on an industry-*cum*-region basis, after taking a fair cross-section of that industry and that in a given case it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay classwise. This Court further laid down the principles in that regard as follows, at p. 92:

"The principles which emerge from the above discussion are:

(1) that in the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into consideration except in cases of bare subsistence or minimum wage where the employer is bound to pay the same irrespective of such capacity;

(2) that the capacity of the industry to pay is to be considered on an industry-*cum*-region basis after taking a fair cross section of the industry; and

(3) that the proper measure for gauging the capacity of the industry to pay should take into account the elasticity of demand for the product, the possibility of tightening up the organisation so that the industry could pay higher wages without difficulty and the possibility of increase in the efficiency of the lowest paid workers resulting in increase in production considered in conjunction with the elasticity of demand for the product—no doubt against the ultimate background that the burden of the increased rate should not be such as to drive the employer out of business."

The discussion on the question of capacity of an industry to pay is wound-up at p. 191 with the following observations:

"Industrial adjudication is familiar with the method which is usually adopted to determine the capacity of the employer to pay the burden sought to be imposed on him. If the industry is divided into different classes, it may not be necessary to consider the capacity of each individual unit to pay but it would certainly be necessary to consider the capacity of the respective classes to bear the burden imposed on them. A cross-section of these respective classes may have to be taken for careful examination and all relevant factors may have to be borne in mind in deciding what burden the class considered as a whole can bear. If possible, an attempt can also be made, and is often made, to project the burden of the wage structure into two or three succeeding years and determine how it affects the financial position of the employer."

In *French Motor Car Co., Ltd.* v. *Workmen*[2] this Court observed at p. 20:

"It is now well settled that the principle of industry-*cum*-region has to be applied by an industrial Court, when it proceeds to consider questions like

1. (1958) S.C.J. 1113 : (1959) S.C.R. 12. 335.
2. (1963) 2 S.C.R. (Supp.) 16 : (1964) 1 S.C.J.

wage structure, dearness allowance and similar conditions of service. In applying that principle industrial Courts have to compare wage scales prevailing in similar concerns in the region with which it is dealing, and generally speaking similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration. Further, even in the same line of business, it would not be proper to compare (for example) a small struggling concern with a large flourishing concern."

The principle that the basis of fixation of wages and dearness allowance is industry-*cum*-region was reiterated in *Greaves Cotton & Co.* v. *Their Workmen*[1].

According to Mr. Ramamurthy, the learned Counsel for the appellant, the principles laid down by the decisions, referred to above have been borne in mind by the Wage Board when it fixed the wage structure and dearness allowance. Learned Counsel also urged that when a wage structure was fixed for the industry as such, it is not necessary that the capacity of individual units should also be considered and that on the other hand it would be enough if a fair cross-section of the industry was taken into account for this purpose as was done by the Wage Board in the present case.

On the other hand, according to Mr. Srinivasamurthy, the learned Counsel for the management, inasmuch as a fair wage was being fixed, the Wage Board was bound to apply the principle of industry-*cum*-region in fixing the wage structure and dearness allowance and the Wage Board has committed an error in not classifying the various units as large, medium and small units and prescribing different scales for different types of units.

We shall now proceed to consider the circumstances under which the Wage Board was constituted, its composition and the approach made by it in fixing the wage structure and dearness allowance.

In Chapter XXVII, paragraph 25, of the second Five-Year Plan of the Government of India, it is stated that statistics of industrial disputes show that wages and allied matters are the major source of friction between employers and workers and that an acceptable machinery for settling wage disputes will be one which gives the parties themselves a more responsible role in reaching decisions. It is further stated that an authority like a tripartite wage board, consisting of equal representatives of employers and workers and an independent chairman would probably ensure more acceptable decisions and that such wage boards should be constituted for individual industries in different areas. In pursuance of this recommendation, the Government of India, by its Resolution No. WB-5 (1)|60, dated 25th August, 1960, set up a Central Wage Board for Jute Industry. The Board consisted of a chairman, two independent members and two members representing employers and two Members representing employees. The terms of reference of the Board were:

"(*a*) to determine the categories of employees (manual, electrical, supervisory, etc.) who should be brought within the scope of the proposed wage fixation;

(*b*) to work out a wage structure based on the principles of fair wages as set forth in the report of the Committee on Fair Wages."

In evolving a wage structure, the Board was also required to take into account the needs of the industry in a developing economy, the special features of the jute industry as an export industry, the requirements of social justice and the need for adjusting wage differentials in such manner as to provide incentives to

1. (1964) 5 S.C.R. 362 : A.I.R. 1964 S.C. 689.

workers for advancing their skill. The wage Board was also required, within two months from the date of its starting work, to submit its recommendations regarding the demands of labour in respect of interim relief, pending its final report.

The Wage Board recommended to the Central Government the grant of interim relief of Rs. 2.85 from 1st October to 31st December, 1960 and Rs. 3.42 from 1st January, 1961 in respect of all jute mills in India, excepting the Katihar Jute Mill in respect of which the interim relief at the rate of Rs. 3.42 was granted from 1st September, 1961. The Central Government accepted this recommendation, by its Resolution No. WB-5(3)|61 dated 25th January, 1961, and requested the jute mills to implement the same as soon as possible. There is no controversy that the respondent mill complied with this request though it involved the company in an additional expenditure of Rs. 1,53,000. This claim of the company has been accepted by the Industrial Tribunal. The Wage Board submitted to the Central Government, on 4th September, 1963, its final recommendations dated 31st August, 1963 and recommended that the new wage structure should be given effect to from 1st July, 1963. The Central Government by its Resolution No. WB-5(16)|63, dated 27th September, 1963 accepted the report and made a request to the employers, the workers and the State Governments to implement the same expeditiously. The standardised basic wages of various categories of workers of jute mills for a month of 26 days or 208 hours are specified in Appendix XI of the Report; and there is no controversy that the basic wages of all categories of workers in the employ of the respondent jute mill is the same as the standardised basic wage contained in Appendix XI. But, there is a further recommendation that so far as the appellant jute mill and another jute mill, *viz* Sri Krishna Jute Mill, were concerned, the wage increase was to be on a phased basis.

We may refer now to the various aspects dealt with by the Wage Board in its report. Chapter III deals generally with the Industry. In paragraph 3.5 it is stated that there is an overwhelming concentration of jute industry in West Bengal and only a sprinkling of it is to be found elsewhere in India. It is also noted that the loomage at the time of the report in the whole of India stood at 72,916 looms. The reasons for the heavy concentration in West Bengal of jute mills are stated to be factors like abundant supply of raw material, proximity of coal fields in Ranigunje, navigability of the Hooghly and the availability of the required type of labour in the neighbourhood. So far as jute mills at other places in India are concerned, in paragraph 3.6 of the Report, it is stated that small jute mills have come up in other States, including Andhra Pradesh, but the total loomage of all such mills outside West Bengal is only 3,242 looms, and the mills are distributed in various places.

Appendix VII of the Report contains a statement showing the mills operating, number of looms and spindles in the whole of India. So far as West Bengal is concerned, the total number of looms is given as 65,383; in Andhra Pradesh as 1,072; in Bihar 1,059; Uttar Pradesh 891 and Madhya Pradesh 220. It will be noted from Appendix VII that in Andhra Pradesh there are two fairly big units, the Nellimarla and Chittavalasa having 316 and 500 looms respectively whereas the respondent mill has only 120 looms. We are particularly referring to this aspect because it is the grievance of the respondent that the Wage Board has compared it with the Nellimarla and Chittavalasa and other big units in West Bengal. A perusal of Appendix VII shews that there are several jute mills having more than 1,000 looms and some having more than 2,000 looms, in West Bengal.

Chapter IV deals with the scope of enquiry. In paragraph 4.1 it is stated that the Board's recommendations will apply to all the jute mills then existing

and also to those that might be started thereafter, and a list of all mills then in existence is given in Appendix VII.

Chapter V deals with minimum wages in the jute industry. In paragraph 5.4, the Wage Board takes note of the fact that the minimum wages in Nellimarla and Chittavalasa jute mills in Andhra Pradesh are found to be the highest in the jute industry. In paragraph 5.26, the minimum wages in West Bengal jute mills from 1948 and as obtaining from 1st January, 1961 has been referred to. Such minimum wages from 1st January, 1961 including Rs. 3.42 granted as interim relief by the wage Board and the dearness allowance, is stated to be Rs. 70.59, comprised of basic wages of Rs. 34.67 + Rs. 3.42 (interim relief) + Rs. 32.50 (dearness allowance). Regarding the jute mills in Andhra Pradesh, it is stated in paragraph 5.35 that Nellimarla and Chittavalasa jute mills were paying from 1st January, 1961, the tottal emoluments of Rs. 81.21 per month to the lowest category of workers for 208 working hours, inclusive of Rs. 3.42 interim relief granted by the Wage Board.

In paragraph 5.38, it is stated that the respondent mill, from 1st January, 1961, is paying total emoluments of Rs. 52.17 per month, comprised of Rs. 19.50 (basic) + Rs. 3.42 (interim relief) + Rs. 29.25 (dearness allowance). The jute mills in Bihar State, as will be seen from para. 5.43 were paying total monthly emoluments ranging from Rs. 69.98 to Rs. 70.59.

Chapter VI deals with the industry's capacity to pay. In para. 6.1 it is stated that two matters which received the highest consideration in the course of the deliberations of the Wage Board were the needs of the workers and the capacity of the industry to pay those needs. It is further stated that the consequence of a fair wage upon the employer or the capacity of the industry to maintain production efficiently, have received the special attention of the Wage Board. In para. 6.8. reference is made to the Fair-Wages Committee's Report that in determining the capacity of the industry to pay, it is wrong to take the capacity of a particular unit or the capacity of the entire industry in the country and that the practical method is to take a fair cross-section of the jute industry. In this connection the Wage Board refers to the clients advanced by the workers and the industry. The workers appear to have suggested the names of mills which were well-established and whose financial position was never in doubt, whereas the industry urged that the capacity of the weaker and marginal units should not be ignored as the wages that are to be fixed by the Wage Board should be such as could be paid without difficulty by all units of the industry.

In para. 6.9 it is stated that the Wage Board was of the view that the only proper and practical method was to take a cross-section of the industry which could be considered as fair in its view. Accordingly, twenty jute mills in West Bengal were selected by it as representing a fair cross-section of the industry in that region. The Wage Board also decided to make a census survey of 9 reporting mills outside the West Bengal region. Accordingly it selected all the three in Andhra Pradesh, two in Bihar, three in Uttar Pradesh and one in Madhya Pradesh. A list of the jute mills in West Bengal and outside West Bengal region considered as forming a representative cross-section of the jute mills in given in Annexure A to the Report. So far as Andhra Pradesh is concerned, all the three mills situate in the State have been taken into account, being Nellimarla, Chittavalasa and the respondent. The Wage Board then considers the capital formation, bonus issue, total paid up capital, reserves and surplus, percentage of dividend declared, profits made; but, under each of these heads, the Wage Board grouped together all the mills in West Bengal, Andhra Pradesh, Bihar, Uttar Pradesh and Madhya Pradesh.

In para. 6.44, the Wage Board expresses the view that it would be possible for the industry to bear the extra burden arising from the new wage structure recommended by it without much difficulty and without affecting the economy of the industry adversely.

In Chapter VII the Wage Board considers the principles by which the Tribunals and other wage-fixing authorities were guided in fixation of wages in West Bengal and outside that State. In para. 7.19, the Wage Board proceeds to state that it has to devise a fair wage structure. If refers to the report of the Committee on Fair Wages that with regard to a fair wage, the lower limit must obviously be the minimum wage and the upper limit is equally set by what may broadly be called the capacity of the industry to pay. In para. 7.25 the Wage Board refers to the claim of the workers that the minimum wages at Calcutta, at prices prevailing in 1960 should be Rs. 125 and that the minimum wage at Kanpur, in Uttar Pradesh, should be Rs. 140 per month; while, on the other hand, the Indian Jute Mills Association appears to have pressed that the then existing wages in the jute industry for all categories of workers were fair.

In para. 7.34, the Wage Board refers to the fact that the wages in the jute industry had not kept pace with wages in cotton textile and engineering industries in West Bengal, as would be seen from the fact that in 1959, while in the jute industry, the minimum wages had gone up by 46% over the 1946 wages, it had gone up in cotton textile and engineering industries by 69.71% and 77.50% respectively. It further notes the fact that the minimum wages in cotton textile mills in West Bengal on 1st April, 1963 were Rs. 83.50 and in the engineering industry Rs. 82 per month. On the other hand, the wages in the jute industry on 1st April, 1963, were Rs. 70.59. On this reasoning the Wage Board comes to the conclusion in para. 7.35 that there was a *prima facie* case for increase in the wages of the jute workers. The Wage Board expresses the opinion that the concept of the paying capacity of the jute industry is not the same as it is generally understood in the case of other industries, in view of the fact that the jute industry is principally an export-oriented industry, depending upon the fluctuating foreign markets.

In para. 7.40 the Wage Board states that in fixing the wage structure for the jute industry it has taken into consideration the prevailing wage structure in the cotton textile industry and the engineering industry in West Bengal. It has noted that in West Bengal, as on 1st April, 1963, the minimum wage in the cotton textile industry was Rs. 84.10 per month and in engineering industry Rs. 82 per month. As in the opinion of the Wage Board there is a great similarity in the nature and condition of work between cotton textile industry and jute industry, in para. 7.43 it decides to devise a wage structure in the jute industry keeping in view the pattern of wages existing in the cotton textile industry in West Bengal.

Regarding dearness allowance, the Wage Board in para. 7.44 decides to introduce a system of variable dearness allowance linked with the consumer price index.

In para. 7.45 the Wage Board refers to the special representations made by the jute mills outside West Bengal that in comparison with the mills in West Bengal they have to pay higher freight charges on coal, batching oil and that mill stores and electricity charges are higher for them, that their productivity is low and that most of them have no export trade. The Wage Board states that it has considered these problems and though there are these locational difficulties for individual jute mills, it has decided that the wage level in the jute industry should as far as possible be uniform throughout the country.

The Wage Board further states that the wages in some of these jute mills were very low, and in order to obviate their financial difficulties in consequence of the raising of wage level, it has decided that the wage level in these mills should be raised in a phased manner.

Having decided that the wage level in the jute industry should be uniform throughout the country, the Wage Board, in para. 7.52 decides that the total minimum wage in West Bengal should be fixed at Rs. 81 per month, consisting of (*i*) basic wage; (*ii*) Wage Board increment; and (iii) variable dearness allowance. The Wage Board further, in para. 7.56, states that in addition to basic wages, all categories of workers should be paid an increase of Rs. 8.33 per month inclusive of interim relief of Rs. 3.42 already granted by it and accepted by the Central Government. This increment of Rs. 8.33 per month is desired to be shown as a separate item under the heading 'Wage Board increment' in the case of all categories of workers and that increment should be treated as part of the basic wages for all purposes like bonus, provident fund, etc.

In para. 7.57 the Wage Board states that the dearness allowance of Rs. 32.50 that was being paid then should be considered as the dearness allowance fixed at the working class consumer price index number of 425, for Calcutta with base year 1939 as 100. It is further stated that the dearness allowance should be a variable one and the rate of increase or decrease should be at O.20 nP. per point rise or fall in the average working class consumer price index number for Calcutta. The dearness allowance is also directed to be revised every six months in the months of February and August of each year.

On the basis of these calculations, in para. 7.58 the Wage Board fixes the total monthly minimum wage payable at Rs. 81 comprised of (*a*) Rs. 40.17 basic wage; (*b*) Rs. 8.33 Wage Board increment; and (*c*) Rs. 32.50 being variable dearness allowance. In para. 7.59, the Wage Board states that the standardised basic wages of various categories of workers of a jute mill for a month of 26 days or 208 hours are enumerated in Appendix XI to the Report.

When considering the wage structure for jute mills outside West Bengal, in para. 7.65 (*a*) the Wage Board states that the basic wages of all categories of workers in the jute mills mentioned by it, outside West Bengal, which includes the respondent mill, should be the same as those in jute mills in West Bengal mentioned in Appendix XI. Therefore, it is clear that the minimum basic wage fixed for the mills in West Bengal has been applied to all the mills outside West Bengal, including the respondent. But, so far as the respondent mill is concerned, the Wage Board, in the same paragraph, gives a direction that the standardised basic wages mentioned in Appendix XI of the Report is to be adopted in a phased manner as follows:

During the first 24 months from the date on which the recommendations of the Board will be effective	Basic wages of all categories of workers should be 20 per cent. less than the standardised wages shown in Appendix XI
During the next 12 months	Basic wages of all categories of workers should be 5 per cent. less than the standardised wages shown in Appendix XI
During the next 12 months	Basic wages of all categories of workers should be 10 per cent. less than the standardised wages shown in Appendix XI

Thereafter . . . Basic wages of all categories of workers should be the same as standardised wages shown in Appendix XI.

In para. 7.66 the Wage Board directs that all categories of workers in jute mills situated outside West Bengal should also be paid the Wage Board increment of Rs. 8.33 per month, inclusive of interim relief of Rs. 3.42 already granted.

In para. 7.67(*c*)it is stated that the rates of dearness allowance of all categories of workers in the respondent mill and in Sri Krishna Mill is fixed at Rs. 32.50 at the average working class consumer price index number of 560 for Eluru for the last six months in 1962 with base year 1935-36 as 100. It is further stated that the dearness allowance should be a variable dearness allowance and the rate of increase or decrease should be 0.20 nP. per point of rise or fall in the average working class consumer price index number for Eluru and that it should be revised every six months in the months of February and August.

Chapter VIII deals with bonus in jute industry and in para. 8.18 the Wage Board makes a recommendation that in the jute industry the payment of bonus should be governed by the rules mentioned therein.

Lastly, in para. 10.8 of Chapter X, the Wage Board states that the new wage structure recommended by it should come into force from July 1, 1963; and it is provided in para. 10.9 that the payment of wages at the new rates should start in any case not later than the week ending 2nd November, 1963.

We have fairly exhaustively dealt with the various matters considered by the Wage Board in its Report. It is no doubt true that the Wage Board has gone elaborately in the matter of fixing of the wage structure in the jute industry. We have earlier referred to the various principles laid down by this Court which should govern the fixing of wages and dearness allowance. The Board itself states that it was fixing a fair wage for the industry. We have adverted to the fact that in the *Express Newspapers Case*[1], this Court has held that in the case of fixation of fair wage, the upper limit may broadly be stated to be the capacity of the industry to pay. It has been further laid down that the capacity of the industry to pay should be gauged on an industry-*cum*-region basis, after taking a fair cross-section of that industry and that, in a given case, it may be even permissible to divide the industry into appropriate classes and then deal with the capacity of the industry to pay class-wise. As the Wage Board was fixing a fair wage for the entire jute industry it may not have been strictly necessary to consider the financial capacity of each individual unit. But, as pointed out in the *Express Newspapers Case*[1], the requirement of considering the capacity of each individual unit to pay may not become necessary if the industry is divided into different classes. Even if the industry is divided into different classes, it will still be necessary to consider the capacity of the respective classes to bear the burden imposed on them. For this purpose a cross-section of these respective classes may have to be taken for careful consideration for deciding what burden the class considered as a whole can bear.

The question is whether the Wage Board has adopted these principles when it fixed the wage structure for the entire jute industry. From the various matters dealt with by the Wage Board and the manner of approach made by it, as referred to above, we are satisfied that no attempt has been made by the Wage Board to divide the industry into classes. It is also clear that no cross-section of such classes has been taken for investigation to decide what burden the units in each class can bear.

1. (1958) S.C.J. 1113.

The approach of the Wage Board to determine uniform wage scales for the entire industry must suffer from an inherent weakness. Conditions, such as easy access to raw materials, transport, nearness of markets for disposal of the manufactured product, availability of labour, the type of market whether within or outside the country for which the manufactured articles are intended and diverse other factors must vary from region to region. Likewise, economic conditions affecting the consumer prices must and do differ, as is well-known, from region to region, depending largely upon whether a particular region is self-sufficient or not in the elemental needs of its citizens and these in turn are bound to affect living standards. It would therefore be too artificial and unrealistic an approach to be obivious of these differences and to attempt to group together all establishments and factories and device common wage-scales applicable to all of them disregarding the peculiar features of the industry in a particular region. Favourable conditions prevailing in one region would place industrial concerns there in a position better than those in other regions where such conditions do not occur. Similarly, in regions where consumer prices are lower, labour would be better off than in the rest of the regions where the living index is higher; yet, the wage scales would be the same in all the regions. Uniformity of wage-scales, irrespective of differences in conditions would place both the employees and the employers in regions where such favourable conditions prevail in an unfairly advantageous position over the employees and employers in the other regions. Instead of attaining harmony there would as a result arise inevitably a feeling of discrimination. Though, as stated by this Court in *Express Newspapers Case*[1] it may not be possible or even necessary for a Wage Board to scrutinise all the establishments separately and it would be enough to take a representative cross-section of the industry for assessment, the cross-section to be a truly representative one and capable of giving a true picture of the conditions of both the industry and labour must be one from each region where establishments of the industry in question are situate.

What the Wage Board, however, did was that instead of proceeding regionwise and selecting a representative cross-section from each region, it selected 20 mills from West Bengal and clubbed them with 9 reporting mills from the rest of the regions, *viz.*, Bihar, Uttar Pradesh, Madhya Pradesh and Andhra Pradesh where a few mills are scattered. The Board considered these 29 mills as representing a cross-section of the industry. It is obvious that these mills so clubbed together could not truly reflect the economic and other conditions prevailing in the mills in different regions with their peculiar problems and differing conditions. That in our view was not a proper approach and was bound to result in injustice especially in view of the peculiar feature of the jute industry that it is predominently concentrated in West Bengal and is export-oriented. Besides, the jute industry in the other regions suffers from a distinct disadvantage as the raw materials have to be transported from a distance at considerable cost. Taking the 20 mills from West Bengal and the 9 mills from outside as forming a representative cross-section was manifestly incorrect as the West Bengal Mills cannot truly be said to be comparable units for the rest of the mills.

Another difficulty in accepting the Wage Board's recommendations arises from the fact that the Board equated the cotton textile industry in West Bengal with the jute industry there and finding the wage-scales in the jute industry lower than those in the cotton textile industry the Board raised the scales in the jute industry so as to bring them to the level of the cotton textile industry. Having so done, the next step which the Wage Board took was to raise also the wage-scales in mills outside West Bengal to bring them in line with the scales proposed

1. (1958) S.C.J. 1113.

by it for the mills in West Bengal. This process gave rise to two infirmities: (*i*) that the Board treated cotton textile concerns in West Bengal as comparable to those in jute industry; and (*ii*) it treated the jute mills in West Bengal as comparable to those outside, although conditions in the different regions where they were situate were obviously different. This meant that the Board gave a go-by to the well-established principle of industry-*cum*-region consistently applied by Industrial Tribunals whenever wage-scales had to be determined.

Such a disharmony in the approach to the problem of determination of wage scales by a Wage Board on the one hand and an Industrial Tribunal on the other must inevitably occur because whereas the attempt of a Board would be to uniformise wage-scales for the entire industry, though it is spread over different parts of the country where conditions can rarely be excepted to be similar or the same, the concern of a Tribunal would principally be to determine equitably the wage scales of a single unit with which it is for the time being concerned. The difficulty would be all the more felt by such a Tribunal where it is faced with the dilemma whether or not it should follow the Board's recommendations arrived at on principles different from (as in the present case) those consistently followed in industrial adjudication. One should have thought that this difficulty would have been realised before the recommendations of the Wage Board were accepted by Government.

The difficulty referred to above arising from the difference in the functions of the two bodies could well have been obviated if the Wage Board instead of laying down uniform scales for the entire industry, irrespective of where its several units were situate and of the different conditions prevailing in various areas, had considered the units in each area separately and determined the wage-scales for each such area by taking from that area a representative cross-section of the industry where possible or where that was not possible by taking comparable units from other industries within that area, thus following the principle of industry-*cum*-region. It is true that in doing so uniformity of wage-scales for the entire industry would not have been attained. But in a vast country like ours, where conditions differ often radically from region to region and even the index of living differs within a fairly wide range, such a target cannot always be just or equitable. If the wage scales had been determined by the Board in the manner aforesaid, even though the Board is not a statutory body and consequently its decisions are of a recommendatory character, it would be possible for industrial Tribunals to give due weight to its recommendations as such recommendations would have been in conformity with the principle of industry-*cum*-region, a principle binding on the Tribunals. It would be difficult in that event for any unit in the industry in that region to propound a grievance that its capacity to pay was not taken into account as the scales so framed would have been determined after taking into consideration scales prevailing in comparable units, whether in that industry or other industries in that region depending on whether in a particular area the accent was on the industry part or the region part of the principle of industry-*cum*-region. The Board, therefore, ought to have selected comparable units from each of the regions where the jute mills are situate and after their examination arrive at common wage-scales for each of those regions instead of grouping together 20 mills from West Bengal and 9 mills from the other regions and treating them as constituting a cross-section representing the industry. The position in which a Tribunal called upon to fix wage-scales would be placed would not be an enviable one for it would find itself in an embarrassing situation where it had either to accept the wage-scales fixed by the Board though they were fixed in contravention of the principle of industry-*cum*-region, or discard them and proceed to fix them on its own on the principle

of industry-*cum*-region, a principle which, as the industrial law stands today, it is bound to follow.

We have already pointed out that the Wage Board has taken the view that the wage level in the entire jute industry should be uniform throughout the country. It has also stated that the wage structure for the jute industry in West Bengal has to be devised having regard to the pattern of wage-structure existing in the cotton textile industry in that area. It is on this basis, and after a comparison of the wage structure prevailing in the cotton textile industry in that area, that the Wage Board has come to the conclusion that the minimum monthly emoluments of a worker in West Bengal must be fixed at Rs. 81 taking in the basic wages, the Wage Board increment and the variable dearness allowance. The standardised basic wages enumerated in Appendix XI has been made applicable to all the jute mills outside West Bengal also, including the respondent mill. We have already referred to the recommendation of the Wage Board in para 7.65 (*c*) that the respondent jute mill should adopt the standardised basic wages fixed in Appendix XI, in a phased manner. Over and above that basic wage, the Wage Board has given an increase of Rs. 8.33 per month, as Wage Board increment and a variable dearness allowance of Rs. 32.50 per month. Though it had been pressed by the jute mills outside West Bengal, that they had to pay higher freight charges on coal, batching oil, etc., and that mill stores and electricity charges were higher for them, the Wage Board insisted that the wage level in the jute industry should be uniform throughout the country. The result of the Wage Board's recommendations, if they are to be given effect to by the respondent mill, will be that as against the minimum monthly wage of Rs. 52.17 that was being paid by the respondent there is a very sharp rise in its wage bill. The claim of the respondent that the recurring expenditure for implementation of the recommendation of the Wage Board is over Rs. 3,75,000, and that it has not the financial capacity to bear this burden, has been accepted by the Industrial Tribunal and that finding has not been challenged before us by the appellant. The respondent mill, which has only 120 looms, has been compared with the two big mills in Andhra Pradesh, *viz.*, Nellimarla and Chittavalasa, having 326 and 500 looms respectively, as also with very large mills in West Bengal, some of whose loom capacity is more than 2,000. That clearly shows that all mills, small as well as large, economic as well as uneconomic, have been clubbed together and treated alike by the Wage Board. In considering the capacity, the Wage Board has taken 20 jute mills in West Bengal as representing a fair cross-section of the industry in that region and it has taken 9 reporting mills outside West Bengal for this purpose. Three mills selected in Andhra Pradesh were the Nellimarla, Chittavalasa and the respondent mills. We have already shown the large disparity that exists between the mills in West Bengal as also between the Nellimarla and Chittavalasa and the respondent mills. We have also referred to the decisions of this Court that to compare wage-scale comparable establishments in the region should be taken into account and that a small, struggling concern should not be compared with a large, flourishing one. But this is exactly what has happened, when the Wage Board treated alike the respondent mill not only with Nellimarla and Chittavalasa jute mills but also with some of the very big and prosperous mills in West Bengal.

The various aspects, dealt with above, establish that the essential prerequisite of deciding the wage structure, *viz.*, to consider the capacity of the industry to pay on the principles laid down by this Court, is absent in the recommendations of the Wage Board and that introduces a fatal infirmity in its decision.

The question of bonus does not arise for our consideration as the res dent has stated that the management has entered into a settlement wit workmen and that they will be entitled for bonus only if the net profits e: Rs. 75,000. It has further been stated that there is no available surplus to rant the payment of bonus. These statements have not been controverte behalf of the appellant.

To conclude, the award of the Industrial Tribunal that the demand o workmen for implementation of the recommendations of the Wage Board is justified, is correct. The appeal fails and is dismissed. In the circumst of the case, there will be no order as to costs.

V. M. K. *Appeal dismiss*

[END OF VOLUME (1970) I M.L.J. (S.C.).]